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In The
Supreme Court of the United States

PAUL S. HAMMEL,

Petitioner,

v.

EAU GALLE CHEESE FACTORY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this employment case brought under the Americans with Disability Act ("ADA"), the United States Court of Appeals for the Seventh Circuit held that the district court did not commit clear error when it found that, due to his bad attitude, Petitioner was not a "qualified individual" under the ADA. The Seventh Circuit also concurred with the district court that Petitioner presented no reasonable accommodations, and therefore declined to consider Respondent's lack of participation in any "interactive process" as moot. The questions presented are:

1. Are non-disability related factors such as an employee's perceived attitude relevant in determining whether that individual is a "qualified individual" under the ADA?

2. Should an employer's duty to participate in the "interactive process" only be triggered after an employee first proposes a specific reasonable accommodation to the employer?

3. Can an employer escape *per se* liability under the ADA if it refuses to participate in the "interactive process"?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully requests that this Court grant his writ of certiorari and review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 11, 2005.

OPINIONS AND ORDERS BELOW

The Equal Employment Opportunity Commission ("EEOC") determination that "there is reasonable cause to believe that there is a violation of the Americans with Disabilities Act of 1990" in this case is reproduced in the Appendix to this Petition ("App.") at App. 116. The EEOC right-to-sue letter is reproduced at App. 118. The Initial Determination of the State of Wisconsin Department of Workforce Development, Equal Rights Division ("ERD") is reproduced at App. 120, with the subsequent determination that "there is probable cause to believe that the Respondent employer has engaged in discriminatory practices" reproduced at App. 128. ERD proceedings were dismissed in preference of litigation in another forum by order reproduced at App. 132.

The United States District Court for the Western District of Wisconsin's order granting partial summary judgment is reproduced at App. 55. The District Court's trial Opinion and Order is reproduced at App. 34. Plaintiff's Motion to Alter Judgment as a Matter of Law, or in the Alternative for a New Trial, was denied by the District Court in an order reproduced at App. 85.

The judgment of the United States Court of Appeals for the Seventh Circuit is published at 407 F.3d 852 and is

reproduced at App. 1. The Court of Appeals' denial of Petitioner's Petition for a Rehearing or Rehearing En Banc was entered on June 24, 2005, and is reproduced at App. 95.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 11, 2005. On June 24, 2005, the panel denied Petitioner's request for a rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The ADA mandates:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2005). A "qualified individual" is:

> [A]n individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and, who, with or without reasonable accommodation, can perform the essential functions of the position.

29 C.F.R. § 1630.2(m) (2005); *see also* 42 U.S.C. § 12111(8).

A "reasonable accommodation" is defined as:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.02(o).

Further, a reasonable accommodation may include, but is not limited to:

> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

Id.; *see also* 42 U.S.C. § 12111(9). The Regulations set forth the process by which reasonable accommodations should be determined:

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.02(o)(3).

STATEMENT OF THE CASE

This case concerns an employer who admits firing an employee because of his disability. The employer was held not liable for these actions, however, because the district court and the Seventh Circuit determined that it was appropriate to consider the disabled worker's *attitude* in determining whether the worker was a "qualified individual" under the ADA (even though it was determined on undisputed facts that the employee was *not* fired because of his attitude or because of work performance issues). If this precedent is upheld, employers will be free to discriminate against disabled workers and simply later claim that the workers' poor attitudes precluded them from being considered "qualified individuals" under the ADA. The Seventh Circuit's reasoning undermines the spirit, intent, and plain language of the ADA. Given the similar frameworks and analogous burdens of proof shared by the ADA, the Age Discrimination in Employment Act ("ADEA"), and Title VII, the Seventh Circuit's reasoning also endangers the integrity of those statutes and may open the door for employers to discriminate against members of other protected classes, claiming those employees also do not constitute "qualified individuals" for attitudinal reasons.

Petitioner Paul S. Hammel is legally blind. He has no vision in his right eye and the field of vision in his left eye is restricted to a corridor of less than twenty degrees. (App. 2.)

In early January 2000, Petitioner applied for a job with Respondent Eau Galle Cheese Factory. He met with Respondent's supervisors and advised them of his limited vision. None of Respondent's supervisors or managers had experience working with blind people. When he was hired, Petitioner asked Respondent's supervisors to tell him if they ever had any concerns regarding his blindness and his ability to perform his job. (App. 135-36.)

Shortly after the interview process, Respondent offered Petitioner a job as a general laborer in the cheese factory. When he first began working at the factory, he performed tasks in the "make room" and the "brine room."[1] After a couple of days, Respondent's supervisors moved Petitioner to the "make room" full-time instead of rotating him between the two rooms. (App. 57-58.) Respondent never advised Petitioner of the basis for this change, and Petitioner assumed it was part of the normal course of employment there. (App. 59.)

During Petitioner's first three weeks of employment at Respondent's factory, Respondent never told Petitioner that it perceived his blindness was causing performance problems. Nor did the company ever approach Petitioner to inquire or discuss whether any accommodation would

[1] Respondent's cheese-making process involves two rooms referred to as the "make room" and the "brine room." In the make room, employees place cheese curds into metal forms, press excess moisture from the forms, and trim the cheese. The cheese is then taken to the brine room, where the cheese is soaked in brine, dried, wrapped, and stamped. (App. 38-39.)

assist him in performing his job better or more safely. Respondent also never informed Petitioner that he was at risk of losing his job if his performance did not improve. (App. 136.)

Notwithstanding Respondent's silence regarding any perceived disability-related work performance issues, Respondent terminated Petitioner on January 27, 2000. At that time, the factory supervisor told him that the company believed Petitioner's vision impairment interfered with his work and posed a safety risk to Petitioner and other employees. A memorandum prepared contemporaneously with Petitioner's termination stated that he was terminated for "non-disciplinary reasons." (App. 43.) Nothing in Respondent's files suggests that Petitioner was fired for any reason other than his disability. When asked post-termination whether Respondent should have approached Petitioner to discuss disability-related concerns affecting his performance, Respondent's owner testified that accommodations were never discussed with Petitioner because he could not "make [Petitioner] see" and "that was the problem." (App. 59.)

Petitioner filed his charge of employment discrimination with the Wisconsin Department of Workforce Development Equal Rights Division, ("ERD") in February 2000, and cross-filed with the EEOC. Ultimately, both agencies found that probable and reasonable cause existed to believe that Respondent discriminated against Petitioner on the basis of his disability. (App. 116-17, 126-27.) The EEOC took no further action and gave Petitioner a right-to-sue letter.

In July 2002, pursuant to 28 U.S.C. § 1331, Petitioner commenced suit against Respondent in United States District Court for the Western District of Wisconsin, alleging violations of both state and federal law, including the ADA.

Both parties moved for summary judgment. In April 2003, the district court determined as a matter of law that: (1) Petitioner was an individual with a disability; (2) Respondent knew about Petitioner's disability when it hired him; (3) Respondent fired Petitioner because of his disability; and (4) Petitioner never posed a "direct threat" to himself or others at the factory. (App. 61-82.) The district court held that the only triable issue remaining post-summary judgment was whether Petitioner was a "qualified individual" under the ADA. (App. 85.) The parties stipulated pre-trial that Petitioner's factory job consisted of several enumerated "essential functions."[3] (App. 135-36.) Having any particular kind of attitude was

[3] As for "essential functions," "the brine room duties at the factory included turning cheese wheels on moveable racks, taking the cheese wheels from the rack and placing them in the brine tank, turning the cheese in the brine tank, salting the cheese in the brine tank, removing the cheese wheels from the tank, placing the cheese wheels on drying racks, and placing and stacking the cheese wheels on pallets. The make room duties included taking cheese material off the drain table and putting it into forms, picking up the forms and placing them on moveable press racks, pulling the press lever to squeeze out moisture once the racks were full, removing the forms from the racks, removing the cheeses from the forms, flipping them, placing the cheeses first in cheesecloth, then into another wheel form, trimming the cheeses with a knife, putting the trimmings in the grinder and operating the grinder, placing the forms on a cart and moving the cart through the swinging doors to the brine room. At times, the movement of product required the use of hydraulic or motorized pallet jacks." (App. 135-36.)

not an essential function of the factory position. (App. 134-41.)

Two working days before trial, Respondent moved for reconsideration of the summary-judgment finding that Respondent fired Petitioner because of his disability. Most significantly, Respondent sought to introduce evidence regarding the "real reason" for Petitioner's termination. Despite its previous position that Petitioner was fired for safety reasons (and following the district court's summary-judgment determination that Petitioner posed no safety risk to himself or others), Respondent then argued that the "real reason" for termination was Petitioner's "bad attitude" in the workplace. The court denied Respondent's Motion for Reconsideration, stating that "summary judgment is not a dress rehearsal or practice run." (App. 46-47.)

Despite the denial of Respondent's motion for reconsideration, and despite its previous ruling foreclosing the issue of the reason for Petitioner's termination, the district court admitted evidence regarding Respondent's newly-discovered "real reason" for terminating Petitioner. (App. 8-10, 47-48.)

Following trial, the district court granted final judgment for Respondent, finding that Petitioner's "bad attitude" prevented him from being a "qualified individual" under the ADA. The court found no "reasonable accommodations" existed, because it did not believe measures such as temporary supervision, additional training, supervisor feedback, use of adaptive techniques, use of a manual pallet-jack instead of a powered pallet-jack, use of verbal cues by coworkers, or even dialogue between Petitioner and his supervisor constituted reasonable accommodations. (App. 50-53.) The district court further declared

that Respondent had no duty to engage in *any* "interactive process" to address problems related to Petitioner's disability before firing him. (App. 52.) The court denied Petitioner's Motion to Alter Judgment as a Matter of Law, or in the Alternative for a New Trial. (App. 11-12, 94.)

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision, declaring that Petitioner failed to demonstrate that he was capable of performing the essential functions of his job because of his attitude. The Court of Appeals agreed with the district court that it was *irrelevant* whether it was Petitioner's vision impairment or his "refusal to take the proper care" in performing his duties, because in either instance, he demonstrated his inability to perform the essential tasks of the job and was therefore not a "qualified individual." (App. 20.) The Court of Appeals did not address directly whether Respondent had a duty to participate in any "interactive process," because it found that issue was moot given the findings that Petitioner was not a "qualified individual" and no reasonable accommodations were proposed. Petitioner's Petition for Rehearing or Rehearing En Banc was summarily denied on June 24, 2005. (App. 16-22, 95.)

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision merits review by this Court on two separate grounds:

First, the decision decided an important and fundamental federal question, previously unaddressed by this Court, but requiring this Court's resolution given the potential impact the decision has on whether someone is a "qualified individual" meriting protection under the ADA.

The Court of Appeals interpreted "qualified individual" in such a way as to factor attitudinal/work-performance issues into the otherwise objective analysis of whether someone has the requisite training and experience to hold a position, and therefore be a "qualified individual." This reasoning contradicts the plain language of the ADA, as well as the Act's legislative history and intent, and will likely create confusion among the circuits. Because the "qualified individual" analysis is similar under the ADA, ADEA, and Title VII, this potential confusion may have detrimental and far-reaching effects.

Second, the Court of Appeals decision effectively establishes that an employer need not engage in the Congressionally-mandated "interactive process" until an employee first presents a specific reasonable accommodation to the employer. Authority regarding when the "interactive process" is triggered and what the consequences are for failure to participate in that process is currently divided among the circuits. Given the division of authority on this important matter, and consequent risk of inconsistent application of federal law, this Court's review of the Court of Appeals decision is necessary.

I. Because of its Fundamental and Important Nature, This Court Should Settle the Federal Question of Whether An Individual's Perceived Attitude Can Determine Whether the Individual is a "Qualified Individual" under the ADA.

In this case, the Seventh Circuit advanced the dubious legal proposition that an employee's attitude can determine whether that employee is a "qualified individual" under the ADA. According to the Seventh Circuit, evidence

about the employer's reason for terminating an employee – offered on the eve of trial – is now relevant to whether an employee is a "qualified individual" under the ADA. Although Petitioner acknowledges that an employer's alleged reasons for termination are certainly relevant in an ADA claim, or any other federal discrimination claim utilizing a *McDonnell Douglas* analysis,[3] such allegations are to be considered under the "reason for termination" prong of an ADA claim, not the "qualified individual" prong. The Seventh Circuit's reasoning, which allows consideration of "attitude" evidence to determine qualification, alters the entire "qualified individual" analysis – otherwise thought to be an objective analysis – and conceivably alters every disabled employee's burden of proof in an ADA case.

To prove a *prima facie* case of disability discrimination under the ADA, an employee must show that:

(1) he is disabled within the meaning of the ADA,

(2) his employer is aware of his disability,

(3) he is qualified to perform the essential functions of his job either with or without reasonable accommodation, and

(4) he suffered from an adverse employment decision *because of* his disability.

Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). In this case, Petitioner established the first, second, and fourth elements of his *prima facie* case at

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[3] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (establishing that plaintiff must first establish a *prima facie* case of discrimination, then the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its action); *see also Pugh v. Attica*, 259 F.3d 619, 626 (7th Cir. 2001) (applying burden-shifting to ADA case).

summary judgment, leaving only the third element, the "qualified individual" prong left for trial. The district court expressly ruled that Respondent fired Petitioner because of his blindness and for no other reason. The Court of Appeals did not disturb the District Court's ruling in this regard.

The ADA defines a "qualified individual" as:

> an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and, who, with or without reasonable accommodation, can perform the essential functions of the position.

29 C.F.R. § 1630.2(m); *see also* 42 U.S.C. § 12111(8). (App. 99, 111.) The phrase "essential functions" means job tasks that are fundamental and not marginal. 29 C.F.R. § 1630.2(n). A disabled individual should not be disqualified from employment because he has difficulty in performing tasks that bear only a marginal relationship to a particular job. H.R. REP. NO. 101-485, pt. 2, § VI, at 45 (1990).

When analyzing whether someone satisfies the "qualified individual" definition, various Courts of Appeals, including the Seventh Circuit, have reasoned that satisfaction of this element involves a two-step inquiry:

(1) Does the individual have proper training, experience, or education to perform the job? and

(2) Can the individual perform the essential functions of the job with or without reasonable accommodations?

Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 786-87 (8th Cir. 1998); *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284 (7th Cir. 1996); *McCrory v. Kraft Food*

Ingredients, 98 F.3d 1342, 1996 WL 571146, at *5 (6th Cir., Oct. 3, 1996). Consequently, after it is determined that an individual has the appropriate training, education, or work experience to perform the job, the "qualified individual" analysis shifts to whether the employee's *disability* prevents him from performing his prescribed duties in view of possible accommodations.

The Seventh Circuit plainly digressed from this accepted analysis. Instead of focusing on (i) whether Petitioner had the appropriate work experience, and (ii) whether Petitioner was physically capable of performing his essential job functions, the Court allowed Petitioner's perceived attitude to determine whether he was a "qualified individual." In doing so, the Court effectively altered the scope of the analysis from whether Petitioner was physically *capable* of doing the job, to whether, in its view, Petitioner performed the job adequately. (App. 14-15.) This latter analysis, however, is reserved for the fourth prong of an ADA claim (why an employer may have taken adverse action against an employee), not the "qualified individual" prong.

Indeed, an employee's attitude can only be relevant to the "qualified individual" analysis if a "good attitude" is an essential function of the job. Under the ADA, "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). (App. 99.) In this case, Petitioner and Respondent stipulated to all essential functions of Petitioner's job pre-trial. (App. 135.) The parties agreed that having a "good attitude" was *not* an essential function

of Petitioner's factory position.[4] Accordingly, to the extent that attitude evidence could have played any rightful role in the determination of Petitioner's "qualified" status here, the Court of Appeals decision is not supported by the factual record.

Aside from the unsupportive factual record, the Seventh Circuit ignores the plain language of the relevant statute and regulations. As referenced above, the regulatory language clearly and unambiguously provides that a "qualified individual" is one who "*can* perform the essential functions" of a position. 29 C.F.R. § 1630.2(m). (App. 111.) The issue is capability, not willingness. *Cf. Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-54 (2003) (employer's policy to deny re-employment to applicants with past workplace misconduct is properly examined under the "reason for adverse action" prong, not the "qualified individual" prong). By using the words "can perform" instead of "performs," Congress (and the CFR drafters) chose to use capabilities as the measuring stick, not attitude or other subjective measures.

Moreover, given that the second part of the "qualified individual" definition focuses on "reasonable accommodations," it seems evident that an individual's "qualified" status turns on one's capabilities in view of a disability, not perceived attitudinal deficiencies. The legislative history regarding the reasonable accommodation part of the "qualified individual" definition further supports this assertion:

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[4] This Court has acknowledged that employers may establish "qualification standards" for jobs. But even these standards must be "job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable accommodation." *See Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 568 (1999).

> The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. *The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment.*

H.R. REP. NO. 101-485, pt. 2, at 51 (1990) (emphasis added). Put simply, the "qualified individual" analysis concerns disability-related barriers to job performance, not other performance barriers.

EEOC Guidelines also clarify that the ADA's "qualified individual" analysis should not involve non-disability related factors. The Guidelines direct that the "qualified individual" element examines "whether an individual with a disability is qualified for the specific position at issue, not at whether s/he is qualified for work in general." *See* EEOC Notice No. 915.002 at § I.A. (2/12/1997), *available at* http://www.eeoc.gov/policy/docs/qidreps.html (citing 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989)). To the extent that "bad attitude" is a characteristic ascribed to an employee, that characteristic is of a general nature, as opposed to a job-specific characteristic, and therefore is not applicable to the "qualified individual" analysis. This, again, amplifies the incongruity of the Seventh Circuit's reliance on "attitude" evidence to determine one's "qualified individual" status.

The Seventh Circuit's reasoning is even more suspect in light of the "regarded as disabled" analysis afforded under the ADA. *See* 42 U.S.C. § 12112(2)(C). Courts will not allow an employee to be terminated because his employer regards him as disabled. *See id.; see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S. Ct.

2139, 2149 (1999) (examining whether petitioners were discriminated against because they were regarded as disabled after the Court found petitioners were not disabled). Accordingly, courts should not allow employers to terminate an employee *because of* his disability, even when he has a disagreeable attitude.[5]

Not only does the Seventh Circuit's decision defy statutory language, legislative history and regulatory guidelines, its application of the "qualified individual" element is inconsistent with other Courts of Appeals' interpretations of the equivalent "qualification" element in other federal anti-discriminatory statutes. For example, claims brought under the ADEA and Title VII require a plaintiff to establish that he is "qualified" for the job at issue, just as in the ADA context. *Compare West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 (5th Cir. 2003); *Peterson v. Scott County*, 406 F.3d 515, 523 (8th Cir. 2005) *with Rohan v. Networks Presentations LLC*, 375 F.3d 266, 273 (4th Cir. 2004).

Allegations of plaintiff's abrasive attitude and poor work performance, did not defeat plaintiff's satisfaction of the "qualification" element for purposes of the ADEA in the Sixth Circuit's analysis in *Ploscowe v. Kadant*, 121 Fed.Appx. 67, 70, 74 (6th Cir. 2005). Rather, in that case, plaintiff's attitude and work performance issues were analyzed in the context of whether the employer had a legitimate non-discriminatory reason for firing plaintiff. *Id.* Similarly, in *Peterson v. Scott County*, the Eighth Circuit concluded that an employee who allegedly had an

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[5] Again, Petitioner does not disagree that an employer can terminate a disabled worker because of his attitude. Rather, an employer cannot use an employee's attitude as a basis to prevent that employee from receiving the protections of the ADA as a "qualified individual" in the first instance.

argumentative attitude and exhibited poor work performance still satisfied the "qualified individual" element of her ADEA and Title VII claims. *Peterson*, 406 F.3d at 521, 523. Given the related purposes behind each of these federal anti-discriminatory statutes, as well as their related frameworks, it follows that the same type of objective proof required to establish the "qualified individual" element for each should be similar.

By allowing non-disability related factors for termination to enter into the "qualified individual" analysis, the Seventh Circuit effectively allows employers to use the same theory and evidence to defeat two separate prongs of disabled employees' ADA claims. If the employer has insufficient evidence to establish that the "reason for termination" was something other than a discriminatory one, it can then try to use the same non-disability related arguments for termination as a basis to refute an employee's "qualified individual" status. As discussed, this directly contradicts the ADA's plain language and intent, its legislative history, and EEOC regulations and guidelines. This Court's guidance on this fundamental issue is needed so that the various federal courts consider the appropriate factors when considering the "qualified individual" prong in ADA cases.

This Court should also review the Seventh Circuit's opinion because that decision has the potential to indelibly and significantly change an ADA plaintiff's *prima facie* burden of proof. Under the Seventh Circuit's erroneous approach, an ADA plaintiff must establish subjective "good employee" characteristics in order to make his *prima facie* case. For example, under the Seventh Circuit's reasoning, an ADA plaintiff may not be considered a "qualified individual" unless he can affirmatively establish that he has a "good attitude," that he has a good attendance record, and/or that he does not have significant marital or

family problems, because each of these things could detract from performance of his job's essential functions. A plaintiff's inability to establish these subjective characteristics would therefore preclude an employer from ever having to provide a legitimate non-discriminatory reason for its employment decision. Accordingly, disabled employees would be precluded from recovery under the ADA, even where their cases would otherwise present direct evidence that the employers took adverse actions against the employees *because of* their disability (as in this case).[6] Such a scenario ignores the precedent set by this Court in *Desert Palace, Inc. v. Costa*, which acknowledged that liability will still attach to an employer whose adverse actions were based on "mixed motives." *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The ADA drafters did not intend for this inordinate and unnecessary proof in order for a disabled employee to demonstrate a *prima facie* case of disability discrimination.

II. Given the Split in Authority Among the Circuits, This Court Should Address the Important Issue of When an Employer's Duty to Engage in the "Interactive Process" is Triggered and Should Provide Guidance on the Resultant Consequences for Failing to Participate in that "Interactive Process" After it is Triggered.

This Court should also grant this petition to clarify issues over which the various Courts of Appeals are split:

[6] This is, again, another example where the Seventh Circuit's analysis could be extended to the analogous federal anti-discriminatory statutes such that other protected class members would now be held to a different, higher standard in making their *prima facie* claims.

namely, (i) when an employer's duty to participate in the "interactive process" is triggered, and (ii) what liability consequences attach to an employer who refuses to participate in the "interactive process." These important "interactive process" issues implicate the essence of the ADA in that they establish what efforts an employer must make to understand an employee's disability and to devise reasonable accommodations that may keep that employee in its workforce. The various Courts of Appeal, as well as employers and employees everywhere, are in need of this Court's guidance and resolution regarding these issues.

A. Resolution Among the Circuits Regarding When an Employer Must Engage in the "Interactive Process" is Crucial.

Although virtually all of the Circuits agree that an employer has a duty to participate in the "interactive process," there is disagreement among them as to when that process is triggered and requires action by the employer. *See, e.g.*, *Jackan v. New York State Dept. of Labor*, 205 F.3d 562, 566 (2nd Cir. 2000), *cert. denied*, 531 U.S. 931 (2000); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), *vacated on other grounds, U.S. Airways Inc. v. Barnett*, 535 U.S. 391 (2002); *Taylor v. Phoenixville School District*, 184 F.3d 296, 312-13 (3rd Cir. 1999); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 952 (8th Cir. 1999); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285-86 (11th Cir. 1997); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 164-65 (5th Cir. 1996). There is further conflict among the Circuits whether an employer's refusal to participate in the "interactive process" triggers liability. *Calero-Cerezo v. US Dept. of Justice*, 355 F.3d 6, 24 (1st Cir. 2004); *Smith v. Midland Brake, Inc.*, 180 F.3d

1154, 1174 (10th Cir. 1999); *Taylor*, 184 F.3d 317-18; *Principal*, 93 F.3d at 165; *Fjellestad*, 188 F.3d at 951-952; *Willis*, 108 F.3d at 285-86; *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir. 2002).

In the Third and Tenth Circuits, the employer has a duty to engage in an "interactive process" after it knows about the employee's disability and his desire for accommodation, if necessary, in order to stay with the company. *Smith*, 180 F.3d at 1172; *Taylor*, 184 F.3d at 315 (quoting *Bultemeyer v. Fort Worth Comm. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996)). In developing this rule of law, the Third Circuit reasoned that both parties hold information that the other does not have, and through the "interactive process," the exchange of information may lead to identification of suitable jobs or accommodations. *Taylor*, 184 F.3d at 316. Furthermore, "it would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process." *Id.* Consequently, in these jurisdictions, an employer has to proactively and affirmatively participate in the "interactive process" before it will be determined that no reasonable accommodations exist. *Id.* at 317; *Smith*, 180 F.3d at 1171-74.

The Ninth Circuit has similarly held that the "interactive process" is triggered *either* by an employee's request for accommodation *or* by the employer's recognition of the need for such an accommodation where the employee has trouble asking for the accommodation because of the disability. *Barnett*, 228 F.3d at 1112. Relying to some extent on, the Third and Tenth Circuits' reasoning, the Ninth Circuit explained in *Barnett v. US Air, Inc.* that forcing an employee to come up with reasonable accommodations before requiring participation in the process by the

employer, (i) effectively exempted the employer from the process, and (ii) thereby conflicted with the goals of the ADA. *Id.* at 1113. As a result, the "interactive process," as defined by the Ninth Circuit, requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective. *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (citing *Barnett*, 228 F.3d at 1114-15).

The Fifth Circuit has held that it is the employee's initial request for an accommodation that triggers the employer's obligation to participate in the interactive process. *Principal*, 93 F.3d at 165. The *Principal* court recognized, however, that there may be instances where "the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer." *Id.* (reviewing claim by employee with bipolar disorder). In those specific situations, the Fifth Circuit suggested that the employee may need to also proffer possible accommodations to initiate the "interactive process." *Id.*

Conversely, the Sixth, Eighth, and Eleventh Circuits have taken a different approach. These Circuits recognize that an employer has a duty to participate in the "interactive process," but this duty does not arise until after an employee presents evidence that a reasonable accommodation exists. *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997); *Fjellestad*, 188 F.3d at 952; *Willis*, 108 F.3d at 953-54.

Prior to hearing this case, the Seventh Circuit held that both an employer and an employee have a duty to assist in finding an appropriate accommodation. *Beck v.*

University of Wis. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996). It set forth the respective obligations of the parties in executing the accommodation process. First, an employee has the responsibility to inform the employer of his disability. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998). If after acquiring this knowledge, an employer believes the disability is preventing the employee from performing the job's essential functions, then the employer should (i) put the employee on notice that there is a problem *and* (ii) raise the issue of accommodations with the employee. *Id.*; *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996); *Beck*, 75 F.3d at 1134; *see also*, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 40, EEOC Notice No. 915.002 (10/17/2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html. And although an employer may later decide that an accommodation proposed or discussed during the "interactive process" would be ineffective or unfeasible, that determination does not negate the initial affirmative obligation of the employer to seek out the employee and work with him to craft reasonable accommodations. *See Giles v. United Airlines*, 213 F.3d 365, 373 (7th Cir. 2000); *Hendricks-Robinson*, 154 F.3d at 693; *Bultemeyer*, 100 F.3d at 1286.

Based on its reasoning in cases such as *Hendricks-Robinson*, *Beck*, and *Bultemeyer*, the Seventh Circuit seems to have recognized that, if an employer knows about an employee's disabled condition and believes that that condition is causing work-performance issues, then the employer should engage in the "interactive process" to determine what, if any, accommodation might be possible. This "triggering" of the "interactive process" based on the employee's knowledge is consistent with the Seventh

Circuit's other decisions in which employers and employees were held responsible for participating in the "interactive process":

> [Both] parties bear responsibility for determining what accommodation is necessary . . . [N]either party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the causes of the breakdown and then assign responsibility.

Bultemeyer, 100 F.3d at 1285 (citing *Beck*, 75 F.3d at 1135).

Notwithstanding its precedent, the Seventh Circuit declined to directly address the "interactive process" issues that Petitioner raised on appeal, other than to suggest that Respondent's unilateral movement of Petitioner from one area in the factory process to another – without informing Petitioner why the change was made and without discussing any accommodations with Petitioner – might satisfy or relieve the employer from its duty to participate in the "interactive process." (App. 27, n.10.) The Seventh Circuit reasoned that it was not necessary to analyze the "interactive process" issue, because Petitioner failed to establish that its proposed accommodations were reasonable. (Id.)

The Seventh Circuit's refusal to review the district court's "interactive process" analysis effectively upholds the district court's ruling that an employer need not engage in the "interactive process" if the employee has not

first proposed a reasonable accommodation. This reasoning is inherently flawed for several reasons. First, it contradicts the Seventh Circuit's previous holdings that require an employer to engage in the "interactive process" when it knows of an employee's disabled status and perceives problems related to that disability.[7] Second, as the Third Circuit points out, if an employer has no obligation to engage in the "interactive process," then possible accommodations likely will never be discovered by the employer or the employee. Third, even under the rule that an accommodation must first be proposed, the "interactive process" should have been triggered in this case, because Petitioner proactively requested that Respondent tell him if disability-related concerns arose so that accommodations could be discussed – such request being a specific accommodation in and of itself. *See Bultemeyer*, 100 F.3d at 1285 (finding that a reasonable accommodation may be as simple as "sitting down ... and talking about the situation.").

The reasoning employed by the Seventh Circuit in this case aligns with the Eighth and Eleventh Circuits' reasoning, but is inconsistent with the ADA's legislative history. The very purpose of the ADA is to preclude employment decisions that "have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability." H.R. REP. NO. 101-485, pt. 2, § VI, at 45 (1990). By its very nature, the ADA focuses on assessing employers' bases for adverse employment decisions and making sure that those decisions are

[7] The Seventh Circuit seems to ignore the facts in this case that Respondent knew about Petitioner's low-vision disability and believed Petitioner was performing inadequately because of that disability.

founded on legitimate reasons, not fears, stereotypes, and biases related to employees' disabilities. It is for this very reason that EEOC regulations require an interactive process – a problem-solving approach – by which an employer can gain information about an employee's disability and restrictions, instead of assuming what the employee can and cannot do. *See* S. REP. NO. 101-116, at 34 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 65 (1990).

When Congress was contemplating the ADA, its members suggested that the employer use an informal four-step process to identify and provide an appropriate accommodation. H.R. REP. NO. 101-485, pt. 2, § VI, at 52. The first informal step identified was for the employer to identify and distinguish between essential and nonessential job tasks of the relevant position. As part of this initial step, the employer was to *collaborate with the individual with the disability* "to identify the abilities and limitations of the individual with a disability for whom the accommodation is being provided." Id. The next step in the process addressed identification of possible accommodations – all of which required the employer to seek information outside of its own resources:

> Having identified the barriers to job performance caused by the disability, the second informal step is to identify possible accommodations. As noted above, *the search for possible accommodations must begin with consulting the individual with a disability*. Other resources to consult include the appropriate State Vocational Rehabilitation Services agency, the Job Accommodation Network operated by the Presidents Committee on Employment of People With Disabilities, or other employers.

Id. (emphasis added); *cf.* 29 C.F.R. § 1630, App. § 1630.9 (EEOC's interpretive guidance setting forth similar four steps to the "interactive process"). Based on this legislative history, there is no doubt that Congress intended for employers to have the affirmative duty to seek out information both from their disabled employees, as well as other third-party resources. This legislative history cannot fairly be read to impose a duty on an employee to come up with possible accommodations before the employer has a duty to participate in the informal process.[8]

The better-reasoned approach is the Third, Ninth, and Tenth Circuits' reasoning that is consistent with the ADA's legislative history. If an employer knows about an employee's disability and the employer recognizes that the employee is having trouble performing as a result of that disability, the employer should not be able to bury its head in the sand and fire the employee without first trying to resolve the employee's disability-related work problems. At a minimum, the employer should at least be willing to talk to the employee about the perceived limitations of his disability and to try to elicit information and ideas to develop possible accommodation in good faith.

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[8] The Court of Appeals concurred with the district court that it was irrelevant whether Petitioner's difficulty in performing the "essential functions" of his job stemmed from his vision problems or from other non-disability related factors. (App. 20.) This view demonstrates the Seventh Circuit's misunderstanding of the entire purpose of the "interactive process" and its apparent willingness to relieve employers of any responsibility to determine the precise limitations of an individual's disability before firing him.

B. There Should be Uniformity Among the Circuits as to the Liability Imposed on Employers Refusing to Participate in the "Interactive Process."

Because it naturally relates to the "triggering" of the "interactive process," this Court should address the related issue as to what consequences flow from an employer's refusal to participate in that interactive process. There is currently a split of authority on this issue, and resolution and uniformity is necessary so that employees and employers across the country are all held to the same expectations.

Most circuits hold that liability attaches to an employer who fails to engage in the interactive process. *See, e.g., Calero-Cerezo*, 355 F.3d at 2; *Smith*, 180 F.3d at 1174; *Taylor*, 184 F.3d at 317-18; *Bultemeyer*, 100 F.3d at 1285; *Principal*, 93 F.3d at 165. These courts reason that, because the "interactive process" is such a "key mechanism for facilitating the integration of disabled employees into the workplace," employers must face liability when they reject this core process. *Barnett*, 228 F.3d at 1116.

There is a minority view among some circuits however, namely the Eighth and the Eleventh, that there is no *per se* liability when an employer does not participate in the "interactive process." *Fjellestad*, 188 F.3d at 951-952. *Willis*, 108 F.3d at 285-86. These are the same jurisdictions in which the "interactive process" is not triggered until the disabled employee proposes a specific accommodation to his employer.

The Seventh Circuit's decision to forego analyzing the "interactive process" issues effectively upheld the district court's conclusion that there is no *per se* liability imposed for an employer's indifference to the "interactive

process." (App. 27 n.10.) This is true, because, if the Seventh Circuit believed *per se* liability existed for failing to participate in the "interactive process," it would have recognized that the issue was relevant even where none of the accommodations proposed by Petitioner at trial were accepted as "reasonable" by the Court.

The Seventh Circuit's unwillingness to address the consequences of Respondent's utter refusal to engage in the "interactive process" at all, contradicts the Seventh Circuit's previous ruling that failure to participate in the process should impute liability to the employer. *Mays*, 301 F.3d at 870 ("if [a reasonable accommodation] existed yet [the employee] failed to obtain it because the employer had not consulted her in order that 'together they can identify the employee's needs and discuss accommodation options,' the fault in the failure to make the accommodation available would be the employer's and he would lose."); *see also Bultemeyer*, 100 F.3d at 1285. The Court of Appeals' view is also contrary to the First, Third, Fifth, Ninth, and Tenth Circuits' position that *per se* liability should attach for non-participation in the process. *Calero-Cerezo*, 355 F.3d at 24 ("An employer's refusal to participate in the process may itself constitute evidence of a violation of the statute."); *Barnett*, 228 F.3d at 1116; *Smith*, 180 F.3d at 1174; *Taylor*, 184 F.3d at 317-18; *Principal*, 93 F.3d at 165. Recognizing the disabled employee's onerous task to come up with reasonable accommodations without the benefit of cooperation by his employer, the Fifth Circuit reasoned:

> An employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled

> to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations.

Taylor, 184 F.3d at 317-18.

Given the legislative history discussed above, it seems clear that, if an employer is unwilling to exert any effort to participate in the "interactive process," then that employer must be held liable. Without any incentive to do so, the constructs of the "interactive process" ring hollow and provide little more than an aspirational, yet irrelevant model of what should be done.

CONCLUSION

The Court of Appeals' decision establishing that evidence of an employee's perceived bad attitude is relevant to the determination of that employee's "qualified individual" status cannot be reconciled with statutory and regulatory language, legislative history, nor is it consistent with related case law regarding the "qualified individual" analysis. Without review by this Court, the decision potentially changes disabled employees' burdens of proofs and may spawn additional precedent that is plainly contrary to the spirit and intent of the ADA. Interpretation of related federal anti-discriminatory statutes is also implicated by the Seventh Circuit's analysis regarding a "qualified individual" and provides additional impetus for review here.

In addition, given the split of authority among the jurisdictions as to what triggers the "interactive process" and the consequences for failing to engage in the process

at all, it is imperative that this Court provide guidance on this point. Doing so would eliminate current confusion and disagreement among the Circuits and ensure uniformity on these points across the country.

DATED this 22nd day of September, 2005.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 03-3578 & 03-3687

PAUL S. HAMMEL,

Plaintiff-Appellant, Cross-Appellee,

v.

EAU GALLE CHEESE FACTORY,

Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Western District of Wisconsin
No. 02-C-0405-C – **Barbara B. Crabb**, *Chief Judge.*

ARGUED APRIL 1, 2004 – DECIDED MAY 11, 2005

Before FLAUM, *Chief Judge*, and COFFEY and EVANS, *Circuit Judges.*

COFFEY, *Circuit Judge*. Paul Hammel, who had previously been adjudged legally blind, began his employment as a general laborer at the Eau Galle Cheese Factory ("EGC"), in Durand, Wisconsin, on January 8, 2000, and was discharged just three weeks later, on January 27, 2000. Shortly thereafter Hammel sued EGC claiming he was unlawfully terminated on the basis of his disability, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111 *et seq.* After a bench trial, the district

court ruled that Hammel was not a "qualified individual" within the meaning of the ADA and entered judgment as a matter of law in EGC's favor. *Hammel v. Eau Galle Cheese Factory*, No. 02-C-0405-C, 2003 U.S. Dist. LEXIS 11380, at *2 (W.D. Wis. June 26, 2003). We affirm.

I. Background

Hammel suffers from congenital glaucoma in both eyes,[1] is without any sight in his right eye, retains only gun-barrel vision[2] in his left eye and thus is considered legally blind. *Id.* at *3. To help compensate for his loss of vision, Hammel has received training at vocational schools in the use of adaptive workplace techniques, and with this

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[1] Congenital glaucoma is a disease, present from birth, "associated with abnormal pressure inside the eye, which eventually causes damage to the optic nerve and permanent loss of vision." EyeMDLink.com, Congenital Glaucoma, at http://www.eyemdlink.com/Condition.asp?ConditionID=2#c (last updated Nov. 1, 2004).

[2] "Gun-barrel vision," more commonly known as "tunnel vision," is a condition commonly associated with advanced glaucomatous optic nerve damage and is characterized by a severe constriction in a person's visual field. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *available at* http://www.mercksource.com/pp/us/cns/cns_hl_dorlands.jspzQzpgzEzzSzppdocszSzuszSzcommonzSzdorlandszSzdorlandzSzdmd_v_10zPzhtm; *see* Mid-America Eye Center, Glaucoma, *at* http://www.midamericaeye.com/surgeries/glaucoma.html (last updated April 15, 2004). A person who suffers from gun-barrel vision "views the world as though s(he) were looking at the world through a tube." THE JKL MEDICAL DICTIONARY, *available at* http://www.jklcompany.com/a.html (last updated May 21, 2001). However, "when due to organic causes such as glaucoma . . . the [vision] field expands at increasing distance." Mid-America Eye Center, Glaucoma, at http://www.midamericaeye.com/surgeries/glaucoma.html (last updated April 15, 2004). In Hammel's case, he described having "no peripheral vision beyond the 20 degree corridor in front of his left eye . . . [but the] visual field in front of his left eye is greater the further away he is from an object."

training has been able to secure work performing various jobs on a temporary basis.

In January 2000, Hammel applied for a position as a general laborer with the defendant, Eau Galle Cheese Factory in Durand, Wisconsin, and was granted an interview with EGC's business manager, Ron Hemmy. *Id.* at *5. During the interview Hammel related that he suffered from glaucoma and advised his interviewer of the limitations caused by his disability. *Id.* After having the job's requirements explained to him, Hammel assured Hemmy that he would be able to perform the necessary tasks without any special accommodation. Hemmy agreed to hire him on a trial basis and informed him that his employment would be conditional and subject to "a probationary period of 90 days." *Id.* at *6. That same day Hammel was given a tour of the factory and a list of his duties and introduced to his supervisor, John Anibas. He was also introduced to a number of his coworkers who in turn demonstrated what his essential duties would be and put him to work.

A. Hammel's Job Performance

The general laborers at EGC, such as Hammel, convert cheese curds into the hard Italian cheeses that EGC produces, and while doing so they are required to perform a variety of tasks at EGC's factory in two separate work areas; the "make room" and the "brine room."[3] The employees are expected to perform the tasks assigned in a

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[3] For a more detailed description of the duties of a general laborer at EGC, *see Hammel*, 2003 U.S. Dist. LEXIS 11380, at *6-7.

rapid and efficient manner, while working in close quarters side-by-side.

According to his supervisors, John Anibas, Dan Simpson, and Doug Smith, Hammel had problems performing many of his duties from day one. For example, they explained that, as part of his duties, Hammel was expected to mold cheese curds into "cheese wheels," and to "turn" or "flip" the wheels in a manner that would ensure that the final product would have a uniform finish. On a number of occasions Hammel failed to properly perform this task, resulting in a defective and unsaleable product. During the production process, part of Hammel's job, like his co-workers, was to remove the cheese wheels from the brine tanks and stack them uniformly on drying racks, but on many occasions he failed to place the cheese wheels properly on the racks, thus allowing the soft, still pliable wheels of cheese to hang over the edge causing a portion of the product to be wasted and drop to the floor. In addition, the cheese wheels had to be stamped with the production date in order that they could be tracked in case of contamination. Anibas noted that Hammel "did not always stamp each cheese" as was instructed, either stamping the cheese illegibly or failing to properly apply the stamp to the finished product. *Id.* Another example of Hammel's lack of attention or aptitude was evidenced in his repeated difficulty stacking the cheese in a manner so as to prevent them from being damaged by tipping over and falling off the pallet and/or causing a safety hazard. Furthermore his supervisors related that Hammel failed to "keep the stacks of cheese wheels level," resulting in unbalanced pallets that posed the risk of toppling over. *Id.* Anibas observed that, in general, Hammel also "worked too slowly at his

tasks to keep up with the speed of [the] cheese production" line. *Id.* at *9.

Aside from a general lack of aptitude and/or ability, Hammel also was known to exhibit a poor attitude and perform many of his tasks carelessly and without regard for his safety or that of his co-workers. Indeed, Simpson "thought the plaintiff seemed eager to work during his first week but seemed to lose interest during the second week, when he spent more time talking with his co-workers and taking breaks than doing his job." Simpson stated that he observed Hammel literally slamming "cheese rounds down on the work table," a dangerous act which "pos[ed] a risk to other workers who were at the same table [considering] [t]he wheels weigh about 30 pounds or more and could inflict injury if they landed on someone's hand or foot." *Id.* at *10. On another occasion, an employee watched Hammel drive an electrically powered pallet jack bearing a pallet of finished cheese wheels into the wall, causing the wheels of cheese to fall off.[4] *Id.* at *12. His supervisors on occasion expressed concern and fear that Hammel might be seriously injured by tripping over hoses that were strategically positioned on the factory floor to wash away excess brine. In addition, Simpson frequently observed Hammel banging into the factory machinery (*e.g.*, hitting his head on the press rack) and

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[4] In the words of a co-worker who observed the incident: "[H]e was driving the electric pallet jack, and all of a sudden the doors [to the adjoining room] went whoop, and they come [sic] slamming open . . . and he come [sic] out, spun a circle and slammed right into the wall. And half of the [cheese wheels] fell off. . . . he didn't act like it was a very big deal at all. We just picked the [cheese wheels] up. . . . [h]e just shrugged it off, laughed it off. . . . I've never seen anybody ram a wall like that in my life. I mean, he hit the wall at full bore."

Hammel even made a point of showing him bruises on his legs that were presumably a result of Hammel's bumping into things. *Id.* at *10. Furthermore, in disregard for his safety, Hammel repeatedly placed his hands not only on top of but also inside the grinding machine when using the apparatus,[5] even after having been ordered by Simpson to cease and desist from such a practice. Eventually Simpson was forced to prohibit Hammel from operating the grinding machine after EGC's owner, John Buhlman "saw [Hammel] putting his hands on top and told Simpson not to [allow him to] operate the grinder anymore." *Id.* at *10-11. When told by Simpson that "he could no longer operate the grinder, [Hammel] acted disgusted with Simpson." *Id.*

Hammel's run-in with Simpson was not the only time he demonstrated a propensity for arrogance and insubordination. Hammel also continued to make personal phone calls on company time in spite of the fact that he had been frequently told by Anibas not to do so and also "walked away from his post whenever he wanted to go outside for a cigarette." On one occasion Hammel went so far as to taunt Smith after he (Hammel) had been reprimanded for taking an unauthorized break by mocking him and, "in an offensive tone . . . [saying] 'Here I am Dougie, Dougie, what do you want me to do now?'" *Id.* at *9. Particularly telling is Hammel's coworkers description of him as a "slacker" with a poor attitude.

Hammel's supervisors initially used remedial measures in an attempt to address his mounting performance problems. They warned Hammel that he needed to be

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[5] Which was used to grind and recycle cheese rinds discarded during processing.

more careful, instructed him to speed up or slow down when performing certain tasks that the job demanded, as well as time and again ordering him to stop taking unauthorized work breaks. In an attempt to accommodate Hammel and believing that he could more efficiently operate in the factory atmosphere, Anibas arranged for Hammel to work in the make room on a regular basis, "despite the fact that [EGC's] practice was to rotate the general laborers between the make room and the brine room." *Id.* However, even with this accommodation, Hammel's work performance failed to improve and his supervisors eventually decided they had to meet with Hemmy to relay their concerns. Specifically, they informed Hemmy of Hammel's work problems, such as his insubordination, poor attitude and work ethic, and related their concerns about his carelessness. After discussing the matter, Hemmy decided that the only course of action remaining was to terminate him. Hemmy later met with Hammel and informed him that he was being discharged due to his limited vision and the fact that it "interfered 'to some extent' with his work and caused [management] concern for his safety and the safety of his coworkers." *Id.* at *13.

B. Hammel's ADA Claims

In July 2002, Hammel responded to his termination by filing suit against EGC under the ADA, alleging in his complaint that EGC intentionally discriminated against him in discharging him on the basis of his disability and failing to afford him reasonable accommodations. EGC, in their answer, denied discharging Hammel "because of" his disability, and instead claimed that he was let go because of his insubordination, consistent carelessness, poor work

attitude/ethic, and "concerns for his safety and the safety of other employees." In addition, EGC claimed that they had been unable to work out any reasonable accommodations for Hammel, but did not challenge Hammel's allegation that he is disabled within the meaning of the ADA.

Following discovery, Hammel and EGC each filed motions for summary judgment. After considering the respective submissions and arguments, the court granted summary judgment to Hammel in part on April 15, 2003, concluding that Hammel had produced sufficient evidence to demonstrate that his employer was motivated to discharge him because of his disability, based on a statement from EGC's owner, Buhlman, in his deposition. *See id.* at *19-20.[6] In spite of the fact that the trial judge determined that Hammel was discharged because of his disability, the judge found that there was a genuine factual dispute as to whether Hammel was a "qualified individual" under the ADA, and reserved that issue for trial, along with the ultimate question of whether EGC's termination of Hammel was in violation of the ADA.

On June 6, 2003, EGC filed a motion under Fed. R. Civ. P. 59(e), requesting that the district court reconsider its earlier partial summary judgment order in favor of the plaintiff in which the court found that it was undisputed that Hammel was terminated "because of" his disability. EGC argued that evidence developed after the entry of the

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[6] In his deposition testimony, Buhlman was asked why EGC did not specifically discuss any safety issues with Hammel before discharging him. Dep. of John Buhlman, at 23-24. In response, Buhlman stated, "I don't know what good it would have done." *Id.* Buhlman was then asked, "And why do you say that sir?" *Id.* Buhlman answered, "Well I can't make him see. And that was the problem." *Id.*

summary judgment order in favor of Hammel would "establish that [Hammel] was not terminated as a result of his disability; [or] in the alternative was not terminated solely as a result of his disability." Defendant's Trial Brief and Brief in Support of Motion for Partial Reconsideration, p. 3. Accordingly, EGC sought to proffer evidence of Hammel's reckless behavior, refusal to follow job directions and poor attitude in order to establish that even if discriminatory intent had entered into the decision, Hammel would have been discharged due to his poor behavior alone and without regard to his vision problems. The trial judge denied EGC's motion on two separate grounds: (1) because it was untimely as filed, *i.e.*, it was filed only "two working days before the start of the trial"; and (2) because it "rested on evidence that should have been developed before [EGC] filed its motion for summary judgment." "Summary judgment is not a dress rehearsal or practice run; it 'is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.'" *Id.* (quoting *Schacht v. Wisconsin Dept. Of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999)).

Following the denial of EGC's Rule 59 motion, a two-day bench trial commenced. During the proceedings Hammel offered testimony concerning his perception of his work performance at EGC. Hammel stated that he felt physically capable of working as a general laborer at the cheese factory, and that none of his supervisors informed him of any problems with his job performance. However, Hammel did admit on cross-examination that he had been warned that he needed to be more careful when stacking and stamping the cheese wheels, and was told in no uncertain terms not to continue making personal phone

calls on work time. Hammel, in support of his claims, also presented a vocational expert, Richard Davis, as a witness who proposed various accommodations that he believed EGC could have implemented that would have allowed Hammel to perform the essential functions of his job.

In response, EGC's owner, Buhlman, business manager Hemmy, and several of his supervisors and employees contradicted Hammel's testimony during the defense's case-in-chief by relating Hammel's record of insubordination, poor work attitude, reckless, careless and unsafe work habits, and overall deficiencies in his work performance.[7] Specifically, Hammel's co-workers recounted their concerns over Hammel's failure to perform his job with the requisite care for their safety as well as his own. Robert Pelke testified that Hammel frequently ran into other people and equipment and that he acted in a reckless manner, especially when he was using the trimming knife, and went on to state that he had spoken with Anit..s prior to Hammel's termination concerning Hammel's "recklessness and carelessness." *Id.* Steven Seller, another co-worker, stated that Hammel was usually "careless when he brought the soft cheese wheels to the work tables and tended to throw them down on the table," that he had "heard other employees complain about [Hammel] and his performance and [the] risks he posed," and opined that Hammel's carelessness in the factory "was [not] related to his visual impairment." *Id.* at *12. Another general laborer, Joseph Sabelko, testified that he attempted to assist Hammel with his performance problems, but whenever he attempted to explain how to properly perform a procedure,

[7] *See supra* at pp. 3-6.

"such as trimming cheese, [Hammel] would turn away and refuse either to listen or to change his procedure." *Id.*

EGC also introduced evidence of Hammel's checkered employment history; details Hammel omitted when he filed a less than accurate and truthful work application upon seeking employment at the company. EGC's proffered evidence established that Hammel in his application had: (a) failed to account for a gap in his employment history while he was in an addiction program; (b) falsely claimed that a job he held at Sears was full-time while in reality it was part-time employment; and (c) listed his job at the Ability Building Center as lasting eleven months, when in fact he had worked there only six months. *Id.* at *16. The defense also demonstrated that Hammel had, for obvious reasons, omitted a previous employer from his work history, Schlosser Lumber in Durand, Wisconsin; a job he held shortly before starting at EGC and left "after being criticized for not working and for failing to follow directions." *Id.* at *15. Hammel's supervisor at Schlosser, Michael Berger, testified that he found it difficult to work with him, and recounted that he repeatedly explained to Hammel how to perform his duties, but Hammel refused to cooperate. *Id.* at *16. For example, Berger explained that Hammel "was supposed to pile certain size boards in certain piles [but] failed to do [so] properly," and that when he was forced to criticize Hammel's performance, Hammel became "upset." *Id.* On one such occasion, Berger stated that Hammel "pulled out his false eye, showed it to Berger and told him", "'You can't fire me, I'm disabled. I'll sue you.'" *Id.* at *16-17.

Following the close of testimony, both parties moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 52(a). The trial judge, after considering the evidence and

the law applicable thereto, granted EGC's motion concluding that Hammel *had failed to demonstrate that he was capable of "perform[ing] the essential tasks of the job in a way that met [EGC's] reasonable expectations," "with or without reasonable accommodation,"* and thus was *not a "qualified individual" with a disability as defined by the ADA. Id.* at *21-22 (emphasis added). In reaching this conclusion, the court reasoned that Hammel's *"difficulties with work that were not the result of his poor vision but were related to his poor attitude, his carelessness and his unwillingness to accept criticism and take direction," and the danger he posed to his own safety as well as that of his fellow employees provided evidence of his inability to perform the job. Id.* at *20-21 (emphasis added). Judge Crabb went on to state that "[e]ven if [Hammel] had been physically capable of performing the essential tasks of his job he was not a qualified individual under the ADA because of his unwillingness to make the adaptations, take the care or exert the effort necessary to allow him to perform the essential elements of the job." *Id.* at *2. Accordingly, the court specifically concluded that EGC was not guilty of discrimination "against [Hammel] by firing him because it believed his disability prevented him from performing his job," and furthermore found that "although [EGC] failed to carry out its obligation to discuss possible accommodations with [Hammel, he] failed to show that there were any accommodations [his employer] could have made that would have enabled him to perform adequately. Without such a showing, the defendant is not liable for its failure to broach the issue of accommodations despite its knowledge of [Hammel's] disability." *Id.*

On appeal, Hammel argues that the court erred when it found his employer did not discriminate against him in

violation of the ADA when terminating his employment and failing to provide accommodations for his disability. Hammel also contends that the court made several evidentiary errors that entitle him to a new trial. EGC cross-appeals, arguing that the court erroneously granted summary judgment to Hammel on the issue of whether EGC was motivated to terminate Hammel because of his disability.

II. Analysis

A. Hammel's Discriminatory-Discharge Claim

Since the defendant received the benefits of a complete bench trial and judgment our review is conducted pursuant to Fed. R. Civ. P. 52(a) "under which 'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1044 (7th Cir. 2002) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573, (1985)). "[T]he question [of] whether intentional discrimination occurred itself calls for a finding of fact, and thus the district court's decision on that point must be assessed under the clear error standard." *Id.* (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)). We review the trial judge's legal conclusions *de novo*. *Id.*

1. The District Court's Consideration of "Non-Disability-Related Evidence"

Hammel argues that the district court erred when it considered evidence of his poor attitude, careless behavior and deficient work performance in concluding that he was *not a "qualified individual" capable of performing the job's*

"essential functions." Hammel claims that this so-called "non-disability-related evidence" of an individual's inability to perform up to an employer's expectations should not factor into the determination of whether or not an individual is a "qualified individual with a disability." We disagree.

The protections of the ADA extend only to "qualified individuals" with a disability. Basith v. Cook County, 241 F.3d 919, 927 (7th Cir. 2001). When determining whether a person is a "qualified individual" under the ADA, courts undertake a two-part inquiry and consider whether, at the time of the termination decision, the employee: 1) satisfies the employer's legitimate selection criterion for the job; and 2) is capable of performing the job's "essential functions" with or without reasonable accommodation from an employer. *Id.; Bay v. Cassens Transp. Co.,* 212 F.3d 969, 974 (7th Cir. 2000). *Put differently, the ADA is designed to prevent discrimination against disabled persons who are otherwise qualified for a job, but as a result of a disability are unable perform the job's essential functions without reasonable accommodations.* 29 C.F.R. Part 1630 Appendix § 1630.9; *see also Matthews v. Commonwealth Edison Co.,* 128 F.3d 1194, 1195 (7th Cir. 1997). However, the ADA does not shelter disabled individuals from adverse employment actions if the individual, *for reasons unrelated to his disability* (such as a poor work ethic, carelessness, bad attitude, insubordination or unprofessional demeanor), is *not qualified* for the job or is *unable to perform* the job's essential functions or fulfill the requirements of the position as prescribed by the employer or "fails to meet his employer's expectations." *See, e.g., Williams v. United Ins. Co. of America,* 253 F.3d 280, 282 (7th Cir. 2001); *Tyler v. Ispat Inland Inc.,* 245 F.3d 969, 972 (7th Cir. 2001);

McPhaul v. Bd. of Comm'rs, 226 F.3d 558, 563-64 (7th Cir. 2000); *Gorbitz v. Corvilla, Inc.*, 196 F.3d 879, 882 (7th Cir. 1999); *DePaoli v. Abbott Labs.*, 140 F.3d 668, 674 (7th Cir. 1998); *Leffel v. Valley Fin. Serv.*, 113 F.3d 787, 794-95 (7th Cir. 1997); *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995).

EGC, as an employer, is certainly entitled to expect its workers, disabled or otherwise, to use care and caution in the workplace and to adhere to factory-wide safety policies and requirements, as well as directives. *See EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000); *EEOC v. Amego, Inc.*, 110 F.3d 135, 143 (1st Cir. 1997). As noted above, Hammel was often careless, such as when he slammed the 30-pound cheese forms on his work table posing a risk of injury to someone's hand or foot, bumped into his co-workers and spilled brine on them, crashed a pallet of cheese wheels into a wall while operating a pallet jack, and stuck his hands in a cheese grinder after being repeatedly warned of the danger. This pattern of hazardous and reckless behavior jeopardized Hammel's safety, as well as that of his fellow workers. The fact that Hammel repeatedly saw fit to disregard the safety and operational rules at EGC, which were enacted to protect the workers from the dangers of suffering injuries inherent in a busy, fast-moving factory setting is obviously eminently relevant to a determination of whether he can measure up to the requirements of his position. *See Exxon Corp.*, 203 F.3d at 875.

The ADA also does not require that EGC, or any employer, condone or accept irresponsible behavior from an employee who, like Hammel, despite repeated warnings failed to follow or comply with company rules and policies and continued to make personal phone calls on work time

and take unauthorized cigarette breaks. Nor does it protect an employee who is insubordinate and refuses to obey and accept direct orders from his supervisors – including but not limited to instructing him to get back to work in addition to creating a direct safety hazard to himself and fellow colleagues. *See Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 262 (1st Cir. 2002). Moreover, the ADA provides no protection for a disabled worker who, like Hammel, for reasons unrelated to his disability *performs in such an unsatisfactory manner (whether it be for reasons of carelessness, insubordination or obstinence) that he fails to keep up with the production pace and abide by the quality-control standards* that EGC has established as a benchmark for all its employees. *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 573 (7th Cir. 2001); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928 (7th Cir. 1995); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1121 (10th Cir. 2004); *Calef v. Gillette Co.*, 322 F.3d 75, 86 n.8 (1st Cir. 2003). We are convinced that the court did not commit error when it considered evidence of Hammel's careless behavior, poor attitude, insubordination, and deficient work performance when considering whether he was a qualified individual within the meaning the ADA.[8]

[8] Given our discussion on this issue, we need not address Hammel's related argument that evidence of his poor attitude, careless behavior and deficient work performance was relevant only to an inquiry into EGC's reasons for terminating him. As we have discussed, consideration of this evidence was proper as part of the court's inquiry into whether he was capable of performing the essential functions of the job in manner that met EGC's legitimate business expectations.

2. The Court's "Qualified Individual" Analysis

Hammel next asserts that the court erred in determining that there were no reasonable accommodations that EGC could have implemented that would have allowed him to perform the "essential functions" of his job at the cheese factory. As noted above, "*[u]nder the ADA, the employer avoids all liability if the plaintiff would have been fired because incapable of performing the essential functions of the job, and the burden of proof on the issue of capability is not on the employer but on the plaintiff.*" *Miller v. Illinois Dep't of Corr.*, 107 F.3d 483, 484 (7th Cir. 1997) (emphasis added). This is because the "provisions of the ADA relating to employment protect only a 'qualified individual,' 42 U.S.C. § 12112; that is one who with or without a reasonable accommodation by the employer can perform the essential functions of the job." *Id.* at 485. Thus, it is Hammel's burden to "*supply evidence sufficient [that would] allow a jury*" *to conclude that reasonable accommodations could or should have been fashioned that would have allowed him to perform the duties of a general laborer in a manner that would meet or exceed EGC's legitimate expectations and satisfy the essential functions of that position. McPhaul*, 226 F.3d at 563 (emphasis added).

i. Hammel's Job Performance Problems Unrelated to His Disability

At the outset, we note that throughout the course of his employment Hammel displayed a number of most troubling work habits that had nothing to do with his disability. Hammel repeatedly took unauthorized work breaks and engaged in making personal telephone calls on

work time. In addition, without permission Hammel would walk outside the factory for cigarette breaks while he was on duty. Hammel also exhibited insubordinate, arrogant and obstinate behavior – unrelated to his vision impairment – when he mocked Smith after being told to get back to work following another unauthorized cigarette break as well as when he refused to cease and desist operating the cheese grinder after he was reprimanded for repeatedly placing his hands on and inside of the dangerous machinery while in operation. The disregard Hammel exhibited for the direct orders he was given and his demonstrated lack of respect for his supervisor's directions evince a troubled, confused and unsuitable employee, not a disabled one. Many of the reckless acts Hammel was guilty of committing in the factory bore no connection to his vision disability, but rather to his insubordinate makeup and nature. For example, Hammel negligently operated an electric pallet jack, which on at least one occasion crashed into a wall, ruining a pallet of cheese wheels (which Hammel shrugged off and laughed about immediately after the incident). In addition, Hammel had a tendency to slam the 30-pound cheese wheels onto the work table, rather than carefully place them as instructed; a practice which distracted and endangered his fellow employees and damaged the cheese product. Hammel cannot reasonably claim that such irresponsible and reckless conduct was the result of his diminished sight. These were serious employment infractions and no employer should be required to accept much less ignore or condone this type of irresponsible conduct simply because the employee acting out also happens to be suffering from a disability within the meaning of the ADA.

Due to Hammel's careless attitude and inability to perform the tasks assigned to him, EGC was certainly justified in discharging him based solely on his behavior and attitude, without regard to his disability. However, unfortunately for EGC, the company made Hammel's disability an issue and without doubt spurred this litigation when, in an attempt to protect him from the real truth of his discharge, they informed Hammel that he was being terminated, not because he was an undesirable employee with serious attitudinal problems, but because his vision impairment "interfered 'to some extent' with his work and caused [EGC] concern for his own safety and the safety of his coworkers," a mistake Buhlman acknowledged in deposition testimony prior to trial. *Id.* at *19. The district court reasoned that these statements were sufficient to demonstrate that EGC had discharged Hammel because of his disability. However, notwithstanding this determination, the judge ruled post-trial that the reasons EGC had given when terminating Hammel were irrelevant because Hammel failed at trial to demonstrate that he was capable of performing the essential functions of the job in manner that met EGC's legitimate business expectations, with or without accommodation. We agree.

Hammel has not argued, nor could he argue that the improper motivations of the decision makers at EGC alone entitle him to relief pursuant to the ADA. *For it is well established that "[u]nder the ADA, the employer avoids all liability if the plaintiff would have been fired because incapable of performing the essential functions of the job." Miller,* 107 F.3d at 484 (emphasis added). Employment decisions motivated by an improper or discriminatory animus are violative of the ADA, but however improper, the ADA only protects "qualified individuals"; those who

can perform the essential functions of their job with or without reasonable accommodations. *Id.* at 485. Thus, it is Hammel's burden to establish either: (a) that he could perform the essential functions of his job without accommodation; or (b) that reasonable accommodations were available and could have been implemented to allow him to perform the essential functions of his job.

ii. Hammel's Inability to Perform the Job without Accommodation

Hammel had significant difficulties while attempting to perform the essential duties of a general laborer at the cheese factory. Further demonstrating Hammel's inability to perform the functions of his job in anywhere near a workmanlike manner was his inability to properly stamp the cheese wheels, and his likewise incapability of correctly forming, stacking, transporting the finished cheese product, and/or flipping the product, all essential to EGC's business. *See supra* pp. 856-58. This is not to mention the risk of injury that Hammel posed to his co-workers by spilling brine, tripping over hoses, and bumping into presses, walls, and fellow workers, some of which were undoubtedly caused by his patent carelessness. *See id.* Whether Hammel had problems performing his duties at EGC resulting from his disability or poor attitude is unimportant; however, what is germane, and is apparent from the record, is the fact that Hammel was unable to perform the essential functions of his job and meet the expectations of his employer.

We agree with the trial judge's conclusion that "*it is irrelevant . . . whether it was [Hammel's] vision impairment or his refusal to take the proper care that caused him*

to bump into his co-workers or the equipment, to run pallets into the wall, or fail to turn and stack the cheese properly or to slam the cheese down on the table . . . [for][w]hatever the cause he has demonstrated his inability to perform the essential tasks of the job . . . [and is] not a qualified individual within the meaning of the [ADA]." *Hammel*, 2003 U.S. Dist. LEXIS 11380, at *22-24 (emphasis added). As this court has made clear on a number of occasions, when the evidence demonstrates that an employee is incapable of performing the job, *the employer need not isolate the disability-related causes for an employee's inferior performance from problems that stem from a poor attitude, insubordination, carelessness, or outright disregard for the safety of himself and his co-workers. See, e.g., Waggoner v. Olin Corp.*, 169 F.3d 481, 484-85 (7th Cir. 1999); *Palmer v. Circuit Court*, 117 F.3d 351, 352 (7th Cir. 1997); *Siefken*, 65 F.3d at 667. Instead, an employer is entitled to conclude that termination is warranted solely on the basis of the employee's patent inability to perform his job in manner that meets the essential requirements of that position. This is true even if, after further inquiry, an employer determines that the employee's inability to perform the job "is due entirely to a disability." *Matthews*, 128 F.3d at 1195; *see also Palmer*, 117 F.3d at 352; *Miller*, 107 F.3d at 484-85. *Either way, an employer is only in violation of the ADA if a terminated employee can establish that reasonable accommodations exist that would have enabled that person to perform the essential functions of his or her job. See Miller*, 107 F.3d at 485-86. As demonstrated below, Hammel failed to put forth any such accommodations and thus cannot prevail.

iii. Hammel's Failure to Demonstrate Reasonable Accommodations

At trial Hammel's vocational expert, Richard Davis, recommended that EGC could have implemented some questionable "accommodations" that he believed would have enabled Hammel to perform the essential functions of a general laborer. Among these proposed "accommodations" were four that involved Hammel's use of "adaptive techniques" that he had previously been trained to utilize during periods of training at "Blind Incorporated" (a vocational training school) prior to his employment at EGC such as using: 1) a "feel" technique to help him properly stack the cheese wheels; 2) a "flipping" technique to ensure that the cheese wheels were flipped and turned correctly; 3) a "foot-shuffling" technique to avoid tripping; and 4) a technique which had him intentionally bump into and feel objects in order to understand physical space. However, Hammel needed no "accommodation" from EGC to make use of these adaptive techniques.

"Reasonable accommodations" under the ADA are defined in part as "modifications or adjustments *to the work environment* [by the employer] . . . *that enable* a[n] . . . individual with a disability to perform the essential functions" of a position. 29 C.F.R. § 1630.2(*o*) (emphasis added). These "adaptive techniques" are skills and know-how that Hammel stated that he had been trained to incorporate into his work routine prior to his employment with EGC. They are not "modifications or adjustments *to the work environment* [by the employer] . . . that enable" him to perform the job's essential functions. Instead, Hammel's proposed "adaptive techniques" were nothing more than "modifications" or "adjustments" to his own work performance that he was expected to utilize without

prodding or "accommodation" from his employer. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) ("[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures . . . must be taken into account when judging [a disability]."); *Siefken*, 65 F.3d at 667. Thus, we agree with the trial judge's determination that these "adaptive techniques" were not "reasonable accommodations" within the meaning of the ADA.

Davis proposed additional accommodations that, in his opinion, EGC supposedly could have undertaken to facilitate Hammel's performance of some of the job's essential functions. Among these "proposed accommodations,"[9] Davis suggested that Hammel could learn to stamp the cheese wheels correctly by having a "co-worker check on [his] stamping and teach him how to hold the stamp to make sure that it printed." *Hammel*, 2003 U.S. Dist. LEXIS 11380, at *15. As the trial judge properly determined, this is not a reasonable accommodation under the ADA. The courts have been reticent, as they should be, to require employers to provide accommodations that necessitate the enlistment of another employee to assist an ADA claimant in performing the essential functions of his job.

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[9] Davis also proposed that EGC could provide Hammel with formal job training, even though EGC does not and has not in the past provided any of its new employees with any different training than Hammel received when he started the job. As stated *infra*, this is not a reasonable accommodation under the ADA, as the ADA "does not require employers to offer special training to disabled employees." *Williams*, 253 F.3d at 282. In addition, Davis suggested EGC could allow Hammel to use a manual rather than an electric pallet jack to move the pallets of cheese wheels. This proposed accommodation does not account for potential slowdowns in the production pace Hammel's use of a manual pallet jack could cause. *See Hoffman*, 256 F.3d at 573.

Id. at *26 (citing *Peters v. City of Mauston*, 311 F.3d 835, 845-46 (7th Cir. 2002)). To be sure, the ADA does not require an employer to accommodate a disabled employee by making special, individualized training or supervision available in order to shepherd that employee through what is an essential and legitimate requirement of the job. *Williams*, 253 F.3d at 282 ("the employer is not required to give the disabled employee preferential treatment, as by giving her a job for which another employee is better qualified, or by waving his normal requirements for the job in question"); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1022 (7th Cir. 1997). In this regard, let us make clear that the ADA "is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee's disability," *see Williams*, 253 F.3d at 282, although it does provide disabled persons an opportunity to work assuming accommodations exist which allow them to perform a job as would any other employee. Accommodations which require special dispensations and preferential treatment are not reasonable under the ADA, thus Davis's recommendation that Hammel be given special training and provided with a person to "check" up on him does not qualify as a reasonable accommodation.

Davis also proposed that Hammel and his fellow EGC laborers could employ "verbal cues" to avoid bumping into each other. However, we are of the opinion that it borders on the absurd to even suggest implementing a measure of this nature in a factory setting of this type. The particular work environment at EGC is excessively noisy and many employees, out of necessity, are found to wear earplugs while performing their duties. Because he would be unable to hear them due to the excessive noise level, it is antithetical and

unreasonable to propose that based on verbal cues Hammel could be prevented from colliding with walls, equipment and other employees near the production line on the busy work floor.

What's more, Hammel's proffered accommodations address only a small portion of EGC's legitimate concerns with Hammel's careless, unacceptable work performance, such as his inability to legibly stamp the cheese wheels, avoid collisions with machines and other employees and a myriad of other problems. More importantly, these proposed measures do not address Hammel's inability to perform a significant number of his *essential* assignments, duties and responsibilities at EGC, such as forming, stacking, and flipping the cheeses. In *Miller v. Illinois Dept. of Corrections,* this court addressed a similar situation in which a woman who had suffered injuries in a car accident, resulting in an almost complete loss of vision, was discharged from her position as a prison guard. *Miller,* 107 F.3d at 484. Allegedly, she was told by the warden that she was being fired because "there was no way a blind person would ever work in his Prison." *Id.* We upheld the district court's conclusion that the guard was not a "qualified person" within the meaning of the ADA, regardless of the allegedly distasteful and irrational motivation behind her termination, because there was no way that she could perform the essential duties of a corrections officer. *Id.* at 485. In coming to this conclusion we found persuasive evidence that, even with accommodations, this woman could fulfill only two out of over ten job requirements of the position. *Id.* In turn we rejected her contention that she should have been allowed to rotate between the two functions which she could perform because "the reason for having multiple able workers who rotate through the

different positions is to be able to respond to unexpected surges in the demand for particular abilities." *Id.* Because Miller was unable to perform the duties of her position as a correctional officer and the prison officials could not offer her reasonable accommodations that would allow her to fulfill those duties, we held that she was not entitled to the protections of the ADA. *Id.*

As was the situation in *Miller,* Hammel and his vocational expert failed to recommend to this court reasonable accommodations that would allow him to perform the essential duties required for employment as a laborer at EGC. *Id.* In addition, Hammel was an insubordinate, reckless, and thus undesirable employee, and we agree with the trial judge's conclusion that *"[n]o accommodation would make a difference for an employee unwilling to exercise care, accept instruction or take responsibility for getting his work done properly."* *Hammel,* 2003 U.S. Dist. LEXIS 11380, at *27 (emphasis added). Also, we agree with the district court's conclusion that Hammel is not a "qualified individual" with a disability under the ADA, and thus is not entitled to the protections thereof. *Basith,* 241 F.3d at 927; *Bay,* 212 F.3d at 973; *DePaoli,* 140 F.3d at 674. As Judge Crabb noted, perhaps "[EGC's] business manager should have told [Hammel] exactly why he was being fired rather than try to sugar coat the news. . . . [but this] failing [does not] make [EGC] liable to [Hammel] under the ADA." *Hammel,* 2003 U.S. Dist. LEXIS 11380, at *28. The district court did not commit clear error in concluding

that EGC did not discriminate against Hammel because of his disability when it terminated him.[10]

B. Alleged Evidentiary Errors by the District Court

Hammel also argues that he is entitled to a new trial because the district court allegedly made evidentiary errors when: 1) restricting the testimony of his vocational expert; and 2) admitting for impeachment purposes evidence of a cash gift he received from his father after leaving EGC and the testimony of one of his former employers on the subject of his poor attitude and work ethic. We review alleged evidentiary errors under the abuse of discretion standard, and will reverse only if the trial judge's ruling was erroneous and the error affected the outcome of the case. *Cooper-Schut v. Visteon Auto Sys.*, 361 F.3d 421, 429 (7th Cir. 2004).

1. Hammel's Expert Witness Report

Hammel contends that the trial judge improperly restricted the testimony of his vocational expert, Richard Davis. The judge restricted Davis from testifying to the

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[10] Because Hammel failed to demonstrate the existence of a reasonable accommodation and because Hammel is not a "qualified individual" under the ADA, we need not address his argument that EGC should be liable for failing to accommodate his disability by not engaging in an "interactive process" to determine if any reasonable accommodations existed. *Mays v. Principi*, 301 F.3d 866, 871 (7th Cir. 2002); *see also Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563-64 (7th Cir. 1996). We note only that EGC did attempt to accommodate Hammel, by shifting his duties and keeping him exclusively in the "make room." *See Hammel*, 2003 U.S. Dist. LEXIS 11380, at *26.

opinions set forth in his expert witness report because Hammel failed to timely disclose the report to EGC prior to trial as required by Fed. R. Civ. P. 26(a)(2). The court accordingly limited Davis's testimony to those assertions that had been disclosed in a timely-filed affidavit attached to Hammel's motion for summary judgment.

The Federal Rules of Civil Procedure require that an expert's report be disclosed "at least 90 days before the trial date" in order for a party to make use of the report at trial. Fed. R. Civ. P. 26(a)(2)(C); *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1332 (10th Cir. 2004). The sanction for failing to comply with Rule 26(a)(2)(C) is "automatic and mandatory" exclusion from trial of the non-disclosed evidence under Fed. R. Civ. P. 37(c)(1) "unless non-disclosure was justified or harmless." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004). Hammel failed to disclose his expert witness's report before trial and thus failed to comply with Rule 26(a)(2)(C) and has failed to offer any explanation as to why he did not make the report available to EGC. In addition, Hammel has failed to offer any argument as to why his failure to produce the report should be considered harmless. Accordingly, we are of the opinion that the trial court's exclusion of Davis's testimony as to his opinions on the report was the proper sanction in light of Hammel's failure to comply with Rule 26(a)(2)(C), and based on the record we also conclude that the court did not abuse its discretion in imposing this sanction. *Musser*, 356 F.3d at 758.

2. EGC's Impeachment Evidence

Hammel next argues that the district court erred in its decision to admit evidence that EGC failed to disclose

prior to trial: 1) evidence of a cash gift he received after leaving EGC; and 2) testimony of one of his former employers on the subject of his poor attitude and work ethic. At trial, EGC sought to enter both forms of evidence to impeach statements Hammel made on cross-examination. Hammel timely objected to admission of the evidence, arguing that EGC failed to disclose prior to trial that it intended to offer either evidence of the cash gift or the testimony by Hammel's former employer. *See* Fed. R. Civ. P. 26(a)(3). Finding that the evidence was intended for impeachment purposes only, the district court concluded that EGC was not required to disclose the evidence prior to trial and properly allowed EGC to present it.

In accordance with Fed. R. Civ. P. 26(a)(1)(A) & (3), evidence offered "solely for impeachment purposes" does not have to be disclosed prior to trial. *See Musser*, 356 F.3d at 756; *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 688 (7th Cir. 1995).[11] EGC offered evidence of a cash gift Hammel received from his father when exploring the issue of whether Hammel had received payment from any collateral sources following his termination which could serve to offset his request for an award of back pay from EGC.[12] *See Flowers v. Komatsu Mining Sys., Inc.*, 165 F.3d 554, 558 (7th Cir. 1999). Hammel was asked on cross-examination if, after his termination, he was "given any

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[11] Hammel also contends that EGC should have disclosed evidence of the cash gift in response to a properly propounded discovery request. *See Varga v. Rockwell Int'l Corp.*, 242 F.3d 693, 697 (6th Cir. 2001). Hammel, however, failed to produce any such discovery request during the trial.

[12] As a damage remedy, Hammel's requested back pay from the time of termination, lost future wages and benefits, and compensatory and punitive damages.

money even as a gift in exchange for staying with his father," and he answered that he had not. To impeach Hammel's answer, EGC offered evidence of the $5,000 cash gift that Hammel received after caring for his father: a $5,000 check and an accompanying transaction statement referencing the check and containing the notation "[t]his money was given to Paul [Hammel] as [a] gift for taking care of Dad since last Nov." Evidence of the cash gift that Hammel received directly contradicted his statement that he had not received such a gift.

We also conclude that the court did not abuse its discretion when allowing EGC to present testimony from Hammel's former employer on the subject of his poor attitude and work ethic. On cross examination, EGC asked Hammel a series of questions concerning many aspects of his period of employment at Schlosser Lumber in Durand, Wisconsin, the job he held immediately prior to his employment at EGC. Specifically, Hammel was asked if, while at Schlosser, he: 1) was told that he was not "doing [his] job correctly"; 2) "threatened the individuals at Schlosser Lumber with a disability lawsuit if they fired [him]"; and 3) had walked off the job and told his supervisor to "go to hell." Hammel answered "no" to all three questions. To impeach Hammel's answers to these questions, EGC introduced testimony from Michael Berger, Hammel's supervisor at Schlosser Lumber. EGC first queried Berger as to whether he "ever [told] Mr. Hammel that he had done [his] job incorrectly?" Berger's response was: "Yes, I did." EGC next asked Berger if Hammel "ever threaten[ed] to sue?" Berger's answer to this question was: "Yes, he did. . . . he said 'I'll sue you if you fire me.'" Subsequently, EGC inquired as to how "Hammel's employment came to an end at Schlosser Lumber?" Berger's

reply was: "One day he was.... more or less standing there, and I told him, Get working.... and he went and got all pissed off and called me a bunch of names and called me a lot of things, and he walked off." Berger's testimony as to these matters directly contradicted Hammel's representations and suggests a lack of honesty; for Hammel claimed that, while employed at Schlosser Lumber, he was never told he was doing his job incorrectly, he never threatened to file a lawsuit if terminated, and he never walked off the job in the wake of a profanity-laced tirade. Berger's testimony thus served to impeach Hammel's credibility as a witness. Accordingly, we hold that the district court did not abuse its discretion in admitting Berger's testimony for impeachment purposes, even though EGC failed to disclose Berger as a witness before the trial.[13] *See DeBiasio,* 52 F.3d at 688.

C. EGC's Cross Appeal

In their conditional cross-appeal, EGC urges this court to reverse the trial court's grant of summary judgment in Hammel's favor on the issue of whether Hammel was terminated on the basis of his disability. However, because we have resolved this case in EGC's favor, and

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[13] Hammel contends that EGC violated the spirit of Fed. R. Civ. P. 26 because it "intended to use" Berger's testimony for purposes other than impeachment. Hammel fails to develop any argument in support of this contention, so we need not address whether Berger's testimony was used for both impeachment and substantive purposes, a scenario which may not be covered by the exception to the discovery requirements of Fed. R. Civ. P. 26 that we have applied herein. *Compare DeBiasio,* 52 F.3d at 686 *with Wilson v. AM General Corp.,* 167 F.3d 1114, 1122 (7th Cir. 1999); *see also Klonoski v. Mahlab,* 156 F.3d 255, 270 (1st Cir. 1998).

uphold the trial court's subsequent judgment as a matter of law for EGC, we need not address the cross-appeal. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 674 (7th Cir. 2003).

III. Conclusion

The decision of the district court is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: **May 11, 2005**

BEFORE: Honorable JOEL M. FLAUM, Chief Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

No. 03-3578

PAUL S. HAMMEL,

Plaintiff-Appellant

v.

EAU GALLE CHEESE FACTORY,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Wisconsin

No. 02 C 405, Barbara B. Crabb, Chief Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL HAMMEL,

Plaintiff,

v.

OPINION and ORDER

02-C-0405-C

EAU GALLE CHEESE FACTORY,

Defendant.

This civil action for injunctive, declaratory and monetary relief was tried to the court on plaintiff's claim that defendant terminated him because of his disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The primary issue at trial was whether plaintiff was a qualified individual under the ADA, that is, whether he was an individual with a disability who could perform the essential functions of the job of a general laborer in a cheese factory, with or without reasonable accommodation, § 12111(8), but the parties adduced evidence relevant to damages as well.

The question of qualification is complicated by the fact that it is not clear how much of the difficulty plaintiff had in performing the essential functions of his job was caused by his physical disability and how much by other factors, such as his apparent lack of interest in learning and performing the essential functions. I conclude that it is not necessary to sort out the separate causes. Even if plaintiff had been physically capable of performing the essential tasks of his job, he was not a qualified individual under the ADA because of his unwillingness to make the adaptations, take the care or exert the effort necessary to allow

him to perform the essential elements of the job. I conclude, therefore, that defendant did not discriminate against plaintiff by firing him because it believed his disability prevented him from performing his job. I conclude also that although defendant failed to carry out its obligation to discuss possible work accommodations with plaintiff, plaintiff failed to show that there were any accommodations defendant could have made that would have enabled him to perform adequately. Without such a showing, defendant is not liable for its failure to broach the issue of accommodations despite its knowledge of plaintiff's disability.

From the record and from the evidence adduced at trial, I find the following facts.

FACTS

Plaintiff Paul Hammel was born in 1950. When he was seven, he lost an eye to congenital glaucoma. He adjusted to this loss: he graduated from high school and worked for a number of years as a construction worker and as a pipefitter. Around 1990, he noticed some loss of vision in his remaining eye, which he attributed to needing new glasses, but was actually the recurrence of his glaucoma. This time, surgery stopped the progression of the disease but left him with only a very narrow field of vision in the central portion of his eye. He is considered legally blind for the purpose of receiving Social Security disability benefits. Unlike persons with other kinds of disabilities, persons who are legally blind remain eligible for disability benefits even if they engage in substantial gainful employment, provided that they do not earn more than the maximum allowed, which in 2003 is $1,330.00 a month. Plaintiff

would have earned more than the allowable maximum had he worked for defendant for a month.

When plaintiff had to stop working as a pipefitter in 1991, he was awarded a disability pension from the pipefitters' union. This pension would cease if he lost his Social Security disability benefits.

Since 1991, plaintiff has worked as a landscaper, home health care provider and remodeler. In 1995, he spent eight to nine months at BLIND, Inc., a rehabilitation center, learning techniques to compensate for his loss of vision. The table below shows his work history from 1992 to date.

1/92-5/93	16 months	No work or vocational efforts	
5/93-2/94	9 months	Wabasha County DAC*	(PART TIME)
2/94-4/95	14 months	No work or vocational efforts	
4/95-12/95	8 months	BLIND, Inc. – vocational program*	
1/96-7/96	6 months	Application for BEP benefits withdrawn due to personal life issues	
7/96-10/97	15 months	No work or vocational efforts	
10/97	1 month	Interspace Simulation	(PART TIME)
11/15/97-11/4/98	12 months	Sears – stocker through Ability Building Center * (Terminated for performance problems)	(PART TIME)
11/4/98-4/23/99	6 months	No work or vocational efforts	

4/23/99-10/27/99	6 months	Ability Building Center * (direct employee)	(FULL TIME)
11/99-1/8/00	2 months	Schlosser Lumber	(FULL TIME)
1/8/00-1/27/00	3 weeks	Eau Gallo Cheese	(FULL TIME)
2-3/00	2 months	Steve Schlosser	(PART TIME)
4/00-8/01	16 months	No work history	
8/01-12/01	4 months	Hans Peter – Lake City (not verified)	(PART TIME)
12/01-6/03	18 months	No work or vocational efforts	

*BLIND, Inc., DAC and the Ability Building Center are programs for helping person with impairments improve their vocational skills or obtain jobs.

During some of the periods shown as "no work or vocational efforts," plaintiff worked odd jobs for which he was paid cash or reduced rent that he did not report on his income tax returns.

Plaintiff applied for work as a general laborer with defendant Eau Galle Cheese Factory in Durand, Wisconsin, a maker of hard Italian cheese. He dropped off an application in late December 1999 or early January 2000, and was interviewed and hired a few days later. Either at the time he left his application or during his interview, he told Ron Hemmy, defendant's business manager, that he had restricted vision in one eye and no vision at all in the other. Before Hemmy hired plaintiff, he checked with defendant's owner, John Buhlman, and two of the three supervisors in the factory to see whether they would have any concern about working with a visually impaired

employee. All of them were willing to give it a try. Hemmy told plaintiff he wold have a probationary period of 90 days. He gave plaintiff a check list of his duties, described their general nature and asked John Anibas, a supervisor, to help plaintiff become acquainted with the work. Anibas worked alongside plaintiff. He and plaintiffs co-workers helped show plaintiff how to perform the essential duties of a general laborer in a cheese factory.

Defendant employs about 25 people, the majority of whom are general laborers. Their duties include work in both the "make room" and the "brine room." In the make room, a drain table runs the width of the room. The employees stand at the table, a few feet apart from each other, filling round metal forms with handfuls of cheese curds they take out of the whey in the drain table. (A "cheesemaker" comes to work shortly after midnight and begins the process in which the milk separates into curds and whey.) Running at right angles to the drain table are press racks. As the employees fill each metal form, they walk it back to the nearest press rack, stack it and repeat the procedure until the racks are full. At that point, they pull a press lever to squeeze excess moisture out of the forms. Next, the employees remove the pressed forms from the racks, grab a clean form, take it and the filled one to a flat topped work table located behind the press racks, where they set down both forms, trim the rind on the filled form, turn the cheese out, lay cheesecloth over the new form and flip the cheese into it. At some point, the newly filled forms are placed on a pallet that one employee takes to the brine room for further processing, sometimes with the help of a hydraulic or motorized pallet jack. Then the employees clean up the make room and prepare to start the process all over again for the next of the 10 to 11

batches of cheese they produce each work day. All of their work takes place in a relatively large, open room in which the employees are moving quickly and almost constantly from drain table to press rack and back and from press rack to work table and doing so in close proximity to one another.

In the brine room, an employee soaks the cheeses in brine, flips and salts them and then allows them to dry. When they are completely dry, he wraps them in shrink wrap and places them on pallets. At some point while the cheese is in the brine room, an employee stamps each wheel with the date and batch number.

Because all of the supervisors work alongside the general laborers in the plant, they are in a position to observe each employee's work performance. They are readily available to listen to any complaints the employees have about each other. Both Buhlman, the owner, and Hemmy, the business manager, spend most of their time in their offices, but Hemmy makes it a practice to walk the factory floor at least once a day.

John Anibas supervised the brine room. He noticed that when plaintiff was supposed to turn the cheese rounds in the brine, he failed to turn all of them. Anibas told plaintiff about it the next morning but plaintiff still missed some. Anibas noticed that plaintiff had difficulty placing dried cheese wheels on the pallet correctly and did not always stamp each cheese as he was supposed to. Also, plaintiff did not keep the stacks of cheese wheels level when it was necessary to do so. Anibas told plaintiff about the stamping problem and about his not stacking the cheese wheels properly and reported the problems to Hemmy. Anibas never told plaintiff he was at risk of losing

his job if his performance did not improve, although he believed that plaintiff worked too slowly at his tasks to keep up with the speed of cheese production and that he talked on the telephone too much. Anibas talked to plaintiff about his excessive use of the telephone. Anibas decided that plaintiff would be more successful in the make room, so he scheduled him to work there on a regular basis, despite the fact that defendant's practice was to rotate the general laborers between make room and brine room.

Doug Smith was a supervisor in the make room. He never observed plaintiff not doing his job properly and never told him that he was doing it improperly. However, he did observe plaintiff's job performance decline steadily and his attitude begin to sour. In Smith's view, plaintiff acted as if he did not care whether he was there or not. He walked away from his post whenever he wanted to go outside for a cigarette. When Smith told him to "knock it off," plaintiff responded by saying to Smith in an offensive tone of voice, "Here I am, Dougie, Dougie, what do you want me to do now?" At that time, Smith considered terminating plaintiff, but did not. Smith told plaintiff that he could not be leaving his post all the time and that he had to use the telephone less often. After that, plaintiff never used the same offensive tone of voice to Smith. However, he continued to take unauthorized cigarette breaks.

Dan Simpson supervised plaintiff in the make room. He thought plaintiff seemed eager to work during his first week but seemed to lose interest during the second week, when he spent more time talking with his co-workers and taking breaks than doing his job. Simpson observed him slamming cheese rounds down on the work table where

they were transferred to the cheesecloth-lined wheels, posing a risk to other workers who were at the same table. The wheels weigh about 30 pounds or more and could inflict injury if they landed on someone's hand or foot.

Simpson observed plaintiff hit his head on the press rack a couple of times, Plaintiff made a point of showing Simpson the bruises on his legs, presumably from bumping into things. On several occasions, Simpson saw that plaintiff put his hands on top of the grinding machine when he was using it to grind discarded cheese rinds and told him not to, but plaintiff never stopped. Defendant's owner, John Buhlman, saw plaintiff putting his hands on top and told Simpson not to let plaintiff operate the grinder any more. When Simpson told plaintiff he could no longer operate the grinder, plaintiff acted disgusted with Simpson.

Robert Pelke works for defendant as a cheesemaker. He rented housing to plaintiff and his wife. He was asked whether he would have any concerns if defendant hired plaintiff. and said he would not, although he does not like the idea of working with a person for whom he is a landlord. He thought that plaintiff worked hard and had a good attitude during the first week but that his attitude changed during the second week. Instead of looking for ways to help, he spent his time on the phone, going outside for cigarette breaks or chatting with other employees. Pelke thought that plaintiff tended to disappear when he was needed, that he ran into other people and equipment and that he acted reckless, especially when he was working with the trimming knife. Pelke talked to Anibas about what Pelke viewed as plaintiff's recklessness and carelessness. When plaintiff was terminated, Pelke assumed it was for his carelessness and bad attitude.

Joseph Sabelko is a general laborer. He showed plaintiff how to perform certain tasks, such as trimming cheese and filling the hoops. When Sabelko tried to tell plaintiff how to do something, such as trimming cheese, plaintiff would turn away and refuse either to listen or to change his procedure. Sabelko worked closely with plaintiff and was often bumped by him, although Sabelko was never hurt.

Steven Steller worked with plaintiff in the make room when Steller was not involved in cheesemaker duties. He thought plaintiff's work ethic seemed to go down hill after his first week. Plaintiff was careless when he brought the cheese wheels to the work tables and tended to throw them down on the table before turning them. Steller saw plaintiff bump into the press rack and observed him drive the pallet into the wall, causing hoops of cheese to fall off. He thought that plaintiff turned the cheese well during the first week and does not think that his subsequent carelessness was related to his visual impairment. He heard other employees complain about plaintiff and his performance and the risks he posed.

No one asked plaintiff whether there were any changes defendant could make that would help plaintiff work more effectively. Plaintiff never asked for any changes or brought up the subject. No one told plaintiff that his overall performance was substandard, that there were concerns about his vision or that his work ethic and attitude were problems. No one told him that he was at risk of losing his job for any reason.

On January 25 or 26, 2000, Buhlman, Hemmy and the three supervisors (Simpson, Smith and Anibas) met to discuss their concerns about plaintiff. All agreed that he

should be terminated. On January 27, 2000, Hemmy called plaintiff into his office and told him that the supervisors had reported that plaintiff's vision impairment interfered "to some extent" with his work and caused them concern for his safety and the safety of his co-workers. At some later time, Hemmy told plaintiff's wife that plaintiff had been terminated because of safety concerns. In a memo dated February 3, 2000, Hemmy wrote that plaintiff had been terminated for "non disciplinary reasons."

Richard Davis is an assistant director for employment programs at BLIND, Inc., a rehabilitation facility in Minneapolis, Minnesota. His job involves helping visually impaired persons find jobs suited to their skills, looking for job opportunities for clients, talking to potential employers about jobs, placing persons in jobs and then following up the employee's job performance. He never saw plaintiff at work at the defendant cheese factory, but visited the factory twice and prepared a videotape of its operations.

Defendant never consulted a vocational specialist about ways of accommodating plaintiff's vision problems. Had it called on Davis, he would have talked with both parties, found out what problems they were having and then tried to build a common level of understanding. As accommodations, he would have suggested that plaintiff not use the power pallet until he became familiar with its use and the layout of the plant. He would have suggested to plaintiff that he put his hands in front of him as he familiarized himself with the press rack so as to avoid bumping his head or shins on the rack. He would have recommended to plaintiff that he call out something like, "Behind you," to avoid bumping into his co-workers, that he run his hands up and down the stacks of cheese wheels to make sure that they were in proper order and that,

when he was turning a cheese wheel, place his right hand on top of the wheel and his left hand on the bottom and then flip the wheel. That way, he would know when his hands were reversed that the cheese wheel was upside down.

Davis would have suggested to defendant that a supervisor or co-worker check on plaintiff's stamping and teach him how to hold the stamp to make sure that it printed, that the factory not leave hoses out in the walkways or, if it did, announce the fact, and that plaintiff should have been encouraged to slow down when walking so as to avoid bumping into people. He believes that these were accommodations that would have eliminated plaintiff's work problems. Davis believed that plaintiff's job with defendant was well within his abilities and that it was a safe working environment for him.

When plaintiff filled out his application for defendant, he did not disclose all of the jobs he had held during the preceding 23 years. Instead, he summarized his work history to make it appear that he had held just four jobs and that he had been employed consistently since March 1977. For example, he listed Fisk Enterprises as his employer for the period June 1993 through September 1997. In fact, as he testified, this was a mistake; he had worked for Fisk from 1996 to 1997 only. He did not list the job at Schlosser Lumber that he left in December 1999 after being criticized for not working and for failing to follow directions. He omitted the period during which he was in an addiction program; he did not indicate that his job at Sears had been part-time only; and he listed his job at Ability Building Center as lasting eleven months when he had worked there only six months.

Plaintiff testified that from November 2001 to July 2002, he had lived with his parents and helped to take care of his father and received no compensation for this work. He did not mention that his brother had written him a check for $5000 as a gift for taking care of his father.

Michael Berger was plaintiff's supervisor when plaintiff worked at Schlosser Lumber shortly before taking the job with defendant. He found it difficult to work with plaintiff. Although he explained to plaintiff a number of times what he was doing wrong when he was supposed to pile certain sized boards in certain piles, plaintiff failed to do his work properly. When Berger expressed any criticism, plaintiff's response was to become upset. On one occasion, when Berger told plaintiff he had not done the sorting correctly, plaintiff pulled out his false eye, showed it to Berger and told him, "You can't fire me, I'm disabled. I'll sue you." On the last day that plaintiff worked for Schlosser Lumber, he stood around and refused to do any work. Berger told him to get started; plaintiff unleashed a string of expletives and walked off the job.

OPINION

The Americans with Disabilities Act prohibits employment discrimination against a qualified individual with a disability because of the disability. 42 U.S.C. § 12112. To prove a violation of the act, a plaintiff must show that he is a person with a disability, that his employer was aware of his disability, that he is a qualified person, capable of performing the essential functions of the job, with or without accommodation, and that his employer fired him because of his disability. *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir.

1999). In an order entered before trial, addressing the parties' cross motions for summary judgment, I found as a matter of law that plaintiff was an individual with a disability (he is legally blind), that defendant was aware of his disability and that defendant fired plaintiff because of his disability. I left open the question of plaintiff's qualifications for the job. Also, I determined that no reasonable jury could find in favor of defendant on its affirmative defense that plaintiff posed a direct threat at the time he was terminated.

Days before the trial began, defendant moved for reconsideration of the summary judgment order, arguing that it had been premature for the court to find that plaintiff had been fired because of his disability when numerous factual issues existed with respect to the adequacy of plaintiff's job performance and whether that performance met defendant's legitimate expectations. Defendant asserted that evidence developed after entry of the order on summary judgment would establish that defendant did not base its decision to fire plaintiff on his disability, or at least solely on his disability. Rather, it contended, the decision was based on plaintiff's reckless behavior, refusal to follow job directions and bad attitude. Defendant asked for an opportunity to prove the real reason for plaintiffs firing or, alternatively, to show that even if discriminatory intent had entered into the decision, defendant would have fired plaintiff regardless of his vision problems. In addition, defendant pointed out that it was plaintiff's obligation to show why there was no inconsistency between his claim that he is a fully qualified individual under the ADA and his receipt of full Social Security disability benefits.

I denied defendant's motion for reconsideration on two grounds. First, it was untimely. The order on the parties' motion for summary judgment was entered on April 15, 2003, but the motion for reconsideration was not filed until June 6, 2003, two working days before the start of trial. Second, the motion rested on evidence that should have been developed before defendant filed its motion for summary judgment. Summary judgment is not a dress rehearsal or practice run; it "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Schacht v. Wisconsin Dept. of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999).

When defendant moved for summary judgment, it failed to show the existence of any dispute about the reasons for plaintiff's termination. The undisputed facts established that defendant fired him because its decision makers believed he could not see well enough to be a safe and productive employee. Defendant's business manager told plaintiff this was why he was being fired; he told plaintiff's wife that the termination was for safety reasons; and in a letter he wrote concerning plaintiff's eligibility for unemployment benefits, he said it was for "non disciplinary reasons." Defendant's owner testified at his deposition that the "problem" with plaintiff's performance was that he could not see. Although defendant argued that plaintiff's vision was not the real reason he was fired, it proposed no findings of fact to support its argument that plaintiff had a bad attitude or to show that plaintiff's coworkers had ever expressed their concerns about plaintiff's attitude to the decision makers who fired plaintiff.

The evidence at trial painted a more complete picture of plaintiff and of the workplace. First, it showed conclusively

that plaintiff had difficulties with work that were not the result of his poor vision but were related to his poor attitude, his carelessness and his unwillingness to accept criticism and take direction. Second, it showed the actual work of the cheese factory and the need for care in the processing of the cheese, both to insure the quality of the final product and to keep the processing operation running smoothly and safely. Third, it showed that the workplace was one in which the supervisors had direct knowledge of the general laborers and their performance because they worked alongside them. This evidence resolved the question I had earlier about the decision makers' knowledge of plaintiff's work deficiencies.

The employment provisions of the ADA protect only "qualified individuals," that is, individuals with disabilities who are capable of performing the essential functions of the job they hold, with or without a reasonable accommodation. 42 U.S.C. § 12112 and § 12111(8). The mix of plaintiff's poor work ethic and his vision impairment complicated defendant's evaluation of plaintiff's work skills. Defendant was dealing with an employee who might have been physically capable of performing the tasks that make up the job of general laborer in a cheese factory had he been motivated to do so. Without the necessary motivation and willingness to accept instruction and direction, however, he was not capable of performing the essential functions of the job, with or without a reasonable accommodation. The net effect was that plaintiff was not a qualified individual within the terms of the act.

From an employer's standpoint, it makes little difference whether a disabled employee is unable to perform the essential tasks of his job because of a physical or mental disability or is unwilling to do so. In either case, the result

is the same. The employee cannot perform the essential elements of his job. In this respect, plaintiff's situation is like that of the plaintiff patrol officer in *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), who was fired because he failed to monitor his diabetic condition and, probably as a result, experienced a disorienting reaction during which he drove at high rates of speed through residential neighborhoods. In affirming the district court's dismissal of the action, the court of appeals observed that the village had hired Siefken knowing he was diabetic; "apparently, it believed that Siefken could monitor his condition sufficiently to allow him to perform the duties of a patrol officer"; and it fired him "only when he proved [the village] wrong." *Id.* at 666. In terminating Siefken, the village relied on his failure to keep himself functional. It is possible that Siefken could not have monitored himself any more closely than he did; not all diabetic reactions are predictable and not all diabetic conditions are controllable, but this was not determinative. Whether Siefken was careless or careful, the fact that the reaction occurred was proof that he was not qualified to perform the duties of a patrol officer.

Siefken demonstrates that it is irrelevant whether an employer terminates an employee because it believes his disability disqualifies him from working safely and efficiently or because it believes that the employee is unwilling to exert the effort needed to perform the tasks despite his impairment. In Siefken's case, it was irrelevant to the village whether his diabetes was uncontrollable or whether he had failed to do whatever was necessary to keep it under control. In either event, Siefken had demonstrated that he was unable to perform his job in a way that met defendant's reasonable expectations. In a similar

fashion, it was irrelevant to defendant whether it was plaintiff's vision impairment or his refusal to take the proper care that caused him to bump into his co-workers or the equipment, to run pallets into the wall, to fail to turn and stack the cheese properly or to slam the cheese rounds down on the table. Whatever the cause, plaintiff demonstrated his inability to perform the essential tasks of his job in a way that met defendant's reasonable expectations.

Plaintiff argues that defendant never gave him a fair chance to show his ability to perform his job properly because it never initiated any interactive discussion about possible accommodations. It is undisputed that plaintiff never asked for any accommodation but, as I noted in the order denying defendant's motion for summary judgment, defendant never told plaintiff he was not meeting its expectations. An employer has an obligation to bring up the matter of accommodations once it knows about an impairment and observes that the impaired employee is having difficulty performing some tasks correctly, *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (employee begins accommodation process by informing employer of disability; when employer knows of disability, its "liability is triggered for failure to provide accommodations"). Defendant's failure to open up the subject does not mean that it is liable to plaintiff. Plaintiff must still show that the outcome of the process would have made a difference, that is, that accommodations existed that could have enabled the employee to perform his job safely and effectively. *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir, 2002). In this case, with two exceptions, the only "accommodations" plaintiff's expert identified relate to adaptive measures that *plaintiff*

could have utilized without any discussion with defendant. He could have used his hands to insure that the cheeses were flipped and stacked properly; he could have called out to other employees that he was behind them; and he could have familiarized himself with the press rack by holding out his hands in from of him.

The only suggested accommodations that relate to defendant deal with the hose on the floor and the stamping process. Plaintiff's expert testified that a hose on the floor could be a danger to any employee, sighted or not, and suggested that whenever a hose was left on the floor, an employee should call out to warn the others. However, he agreed that plaintiff could have avoided the hose by shuffling his feet as he walked. As to the stamping process, the expert's suggestion involves close supervision and direction, at least at first, to teach plaintiff just how to hold the stamp to obtain a clear print on every cheese. It does not address the problem of insuring that every cheese round carries a legible stamp. Given the critical importance of the stamp, it might be necessary for another employee to check each round to make sure that the stamp worked. Courts have been loath to require accommodations that involve the use of another employee to do part of an ADA claimant's job. *See, e.g., Peters v. City of Mauston*, 311 F.3d 835, 845-46 (7th Cir. 2002) (request for accommodation unreasonable if it requires another person to perform an essential function of job) (citing, inter alia, *Hanson v. Henderson*, 233 F.3d 521, 523-24 (7th Cir. 2000; *Cochrum v. Old Ben Coal Co.*, 10 F.3d 908, 912 (7th Cir. 1996)). Defendant dealt with the problem by keeping plaintiff in the make room, where stamping was not part of the job. Although that was a unilateral decision and not the result of any discussion between the parties, it relieved

plaintiff of the need to perform one task with which he was having trouble. The fact is that no accommodation would make a difference for an employee unwilling to exercise care, accept instruction or take responsibility for getting his work done properly. Like the plaintiff in *Siefken*, 65 F.3d 664, plaintiff could have taken responsibility for his disability. He could have used adaptive measures like those his expert described and exercised more care in handling his tasks. The slamming or dropping of the cheese rounds is a good example. It does not require sight or any special accommodation to set an object down on a table carefully. Anyone can assess the top of a table with his body as he stands against it and then lower the object down to that level. Plaintiff sabotaged his own chances because of his refusal to follow directions, shoulder his share of the workload and perform his assigned tasks carefully.

As a good management practice, defendant's business manager or one of plaintiff's direct supervisors should have taken plaintiff aside early in the second week when his work performance began to deteriorate and spoken frankly to him about what he would need to do in order to keep his job. Employees deserve this kind of candor and direction. Defendant's business manager should have told plaintiff exactly why he was being fired rather than to sugar coat the news. However, neither of these failings make defendant liable to plaintiff under the ADA. To establish such liability, plaintiff must prove that he was qualified to perform the essential functions of the job of general laborer in the cheese factory, with or without accommodations, but that defendant fired him anyway, simply because of his disability. Plaintiff cannot make this showing. To the contrary, the evidence at trial established

that defendant had ample reason for finding that plaintiff lacked the qualifications to perform the essential functions of his job, with or without accommodation. He had trouble keeping up with the production pace; he did not turn, or stack the cheese properly; he slammed cheese rounds on the table; he ran the pallet into the wall; he ran into his co-workers at times or bumped them; and he disregarded his supervisors' and co-workers' attempts to instruct him.

Although defendant reached its decision to terminate plaintiff after a relatively short time, plaintiff's prior work history supports defendant's assessment of his work ethic and abilities. Plaintiff's experience at Schlosser Lumber was similar to his experience at the cheese factory. Sears terminated him for performance problems in 1998.

This conclusion makes it unnecessary to consider the damages to which plaintiff would be entitled had he proved that defendant violated the ADA when it terminated him in January 2000. I note however that it is extremely unlikely that plaintiff could have proved any damages of any significance. Not only does his work record show no employment in the previous nine ears lasting longer than six months but plaintiff would have become ineligible for both his Social Security and his union disability pension had he continued to work for defendant.

ORDER

IT IS ORDERED that the clerk of court enter judgment in favor of defendant Eau Galle Cheese Factory and against plaintiff Paul Hammel on plaintiff's claim that defendant terminated him in violation of the Americans with Disabilities in Employment Act.

Entered this 26th day of June, 2003.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL S. HAMMEL,

Plaintiff,

v.

EAU GALLE CHEESE FACTORY,

Defendant.

OPINION AND ORDER

02-C-405-C

Plaintiff Paul Hammel, who is legally blind, was terminated by defendant Eau Galle Cheese Factory after being employed there for approximately three weeks. In this civil action for monetary, injunctive and declaratory relief, plaintiff contends that defendant terminated him because of his disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.395. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1367.

Both parties have filed motions for summary judgment. Defendant's motion will be granted with respect to plaintiff's claim under the state fair employment act because state law requires persons seeking relief under the statute to present their claims to the Department of Workforce Development. Wis. Stat. § 111.39. After the department makes its decision, a dissatisfied party must appeal to the Labor and Industry Review Commission. *Id.* Only after the commission has ruled may a party seek judicial review. Wis. Stat. § 111.395. The record shows that plaintiff presented his claims initially to the Department of Workforce Development but voluntarily dismissed them before the department made its final decision. As a result, this court does not have subject matter jurisdiction over

plaintiff's state fair employment claim. *Bourque v. Wausau Hospital Center,* 145 Wis. 2d 589, 427 N.W.2d 433 (Ct. App. 1988); *Bachand v. Connecticut General Life Insurance Co.,* 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981); *see also Koehn v. Pabst Brewing Co.,* 763 F.2d 865 (7th Cir. 1985); *Mursch v. Van Dorn Co.,* 627 F. Supp. 1310 (W.D. Wis. 1986), *aff'd,* 851 F.2d 990 (7th Cir. 1988). Although defendant did not raise this issue, subject matter jurisdiction cannot be waived. *Weaver v. Hollywood Casino-Aurora, Inc.,* 255 F.3d 379, 381 (7th Cir. 2001). Accordingly, this claim must be dismissed.

With respect to plaintiff's claim under the ADA, the issues are whether plaintiff is a "qualified individual" as defined by the act and whether he posed a "direct threat" to the health or safety of himself or others at the time he was terminated. Because I conclude that there is a genuine issue of material fact with respect to whether plaintiff is a qualified individual, both parties' motions for summary judgment will be denied on that issue. However, I conclude that no reasonable jury could find in favor of defendant on its affirmative defense that plaintiff posed a direct threat at the time he was terminated. Accordingly, plaintiff's motion for summary judgment will be granted with respect to that issue.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Paul Hammel has been legally blind since at least 1991. He has no vision in his right eye and the field of vision in his left eye is restricted to a 20° corridor. Since 1991, plaintiff has worked as a general laborer for a

construction company, a department store and a lumber company. At these jobs he performed tasks such as unloading delivery trucks, stocking shelves and stacking lumber. Plaintiff also worked as a maintenance employee and general aid for the Wabasha County Development Achievement Center and as a courier supervisor for the Ability Building Center. Before 2000, plaintiff had never been denied employment or terminated from employment because of his visual impairment.

Defendant Eau Galle Cheese Factory is a Wisconsin corporation that makes hard Italian cheese. Plaintiff applied for a position with defendant in early 2000. Soon after, plaintiff met with Ron Hemmy, defendant's general business manager, to discuss an available position for a "general laborer" at defendant's plant in Durand, Wisconsin. During the discussion, plaintiff told Hemmy that he was legally blind. Plaintiff explained that he has no vision in his right eye and that the vision in his left eye is very limited as a result of congenital glaucoma. After speaking with plaintiff, Hemmy met with the plant supervisors and asked them whether they believed that a person with "some vision limitation would have any particular problems in the work environment." One of the supervisors responded, "Well, let's see if it would work for him." However, one supervisor, Dan Simpson, had concerns about plaintiff's ability to perform the job because of his vision impairment.

Hemmy called plaintiff on January 7, 2000, to tell him that he was hired. Plaintiff began work the following day. He worked in both the "make room" and the "brine room." His duties consisted primarily of moving materials from one place to another. In the make room, he would pick up and move cheese materials into forms and then onto racks,

flip the cheese, trim it with a knife, place the trimmings in a grinder, move the cheese forms onto a cart and push them into the brine room, where he would stamp the cheese, place it in a brine tank, turn and salt the cheese, take it out of the tank and onto a drying rack and finally onto pallets. Multiple employees worked in both the make room and the brine room.

The morning after plaintiff's first day, one of plaintiff's supervisors, John Anibas, noticed that not all the cheese had been flipped, some cheeses were hanging off the edges of the carts and some of them had been misstamped. Anibas told plaintiff that if he had a problem, he should take his time so that the job was done correctly. On plaintiff's second day, Anibas instructed plaintiff on how to flip the cheese and began pulling plaintiff away from his duties in the make room. On plaintiff's third or fourth day, Anibas said to plaintiff, "We've got to be careful."

After a few days, Simpson decided to take plaintiff out of the make room and limit his tasks to the brine room, where there is less "commotion and traffic." While plaintiff was working in the brine room, Anibas told Hemmy that plaintiff was having some problems with piling cheese wheels on pallets. Anibas sent plaintiff back to work in the make room when he concluded that plaintiff was not performing successfully in the brine room. When plaintiff returned to the make room, Simpson assigned him the tasks of grinding cheese rinds and greasing the cheese wheels. Simpson does not believe that plaintiff did a good job at greasing the wheels, but he does not remember why. Simpson was concerned about the way plaintiff put rinds into the grinder. Simpson believed that plaintiff pushed his hands too far into the machine, creating a risk he would get his hands stuck. When John Buhlman, defendant's owner,

saw the way plaintiff used the grinder, he told Simpson to take plaintiff off that machine.

The factory is not a gentle environment. Plaintiff frequently stumbled, bumped into other employees and carts, bumped his head on carts and tripped over hoses. At least once, plaintiff scraped his knuckles on equipment. Other employees bumped into each other in order to avoid plaintiff. One employee saw plaintiff carrying his trimming knife outward instead of inward and once saw him run a pallet jack into the wall. The employee reported the incident to his supervisors. Several employees, including Mikey Meixner, Robert Pelke and Steve Seller came to Simpson, telling him that they did not want to work next to plaintiff. Joe Sabelko, another employee, told his supervisors that he was concerned that plaintiff could not do his work safely. Plaintiff never injured one of his co-workers.

No one informed plaintiff that he was doing a poor job or that he would be terminated if his performance did not improve. Neither Hemmy nor Douglas Smith (another supervisor) discussed with plaintiff a concern that plaintiff might hurt himself or other employees. No one at Eau Galle asked plaintiff or someone outside the company whether there were any accommodations that would assist plaintiff in performing his job or in making it safer. Smith believed that other people were talking to plaintiff about these issues. Hemmy, Simpson and Anibas did not speak with plaintiff because they believed that there was no way that they could accommodate plaintiff. Simpson believed that plaintiff could not be accommodated because Simpson could not change plaintiff's working environment. Buhlman never discussed possible accommodations with plaintiff because he could not "make [plaintiff] see" and "that was the problem." None of the supervisors or managers at Eau

Galle had experience working with blind people. If any of them had approached plaintiff about his disability interfering with his job, plaintiff could have contacted an agency for the blind that could assist in determining an appropriate accommodation.

On January 25 or 26, 2000, Buhlman, Hemmy, Simpson, Smith and Anibas had a meeting to discuss the concerns they had about plaintiff. During the meeting, they decided to terminate plaintiff. The following day, Hemmy called plaintiff into his office and told him that his supervisors had reported that his vision impairment interfered "to some extent" with his work and that they were concerned for his safety and the safety of other workers. During a later meeting, Hemmy told plaintiff's spouse that plaintiff had been terminated because of safety concerns. In a memo dated, February 3, 2000, Hemmy wrote that plaintiff had been terminated for "non disciplinary reasons."

OPINION

The Americans with Disabilities Act prohibits employers from discriminating against "a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual" is one who both possesses the prerequisites for the position, such as skills and experience, and can perform "the essential functions" of the job, with or without a "reasonable accommodation." 42 U.S.C. § 12111(8); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 524 (7th Cir. 1996) (citing 29 C.F.R. app. § 1630.2(m)). An employer's failure to provide a reasonable accommodation to a qualified individual constitutes discrimination under the act unless the accommodation would

cause an undue hardship on the employer. 42 U.S.C. § 12112(b)(5). In addition, an employer may deny or terminate employment if an individual poses a "direct threat" to health or safety. 42 U.S.C. § 12113(b).

To prevail on his claim under the ADA, plaintiff must demonstrate that 1) he is an "individual with a disability"; 2) defendant was aware of his disability; 3) he could perform the essential functions of the employment position with or without reasonable accommodation; 4) his disability was the reason defendant terminated him. *Foster v. Arthur Andersen, LLP,* 168 F.3d 1029, 1032 (7th Cir. 1999).

A. Individual with a Disability

The parties agree that plaintiff is an individual with a disability within the meaning of the ADA and that defendant was aware of plaintiff's disability. A person meets the definition of an individual with a disability if he or she (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such an impairment; or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2)(A)-(C). It is well-established that "seeing" is a major life activity. *See Dvorak v. Mostardi Platt Associates, Inc.,* 289 F.3d 479, 483 (7th Cir. 2002) (quoting 29 C.F.R. § 1630.2(i)); *Winfrey v. City of Chicago,* 259 F.3d 610 (7th Cir. 2001). Further, defendant does not argue that there are corrective measures that plaintiff could employ to lessen his impairment. *See Sutton v. United Airlines,* 527 U.S. 471 (1999) (whether impairment is "substantially limiting" must be determined with corrective measures taken into account). Accordingly, I conclude that plaintiff is an individual with a disability under § 12102(2)(A).

B. Defendant's Reason for Termination

It is not clear whether defendant disputes that it terminated plaintiff "because of" his disability. For the most part, defendant's argument focuses only on whether plaintiff could perform the essential functions of his job in spite of his disability, whether it made reasonable accommodations for him and whether he posed a direct threat to health or safety. However, in its proposed findings of fact, defendant refers to its belief that plaintiff "did not take direction well," had a "bad attitude" and took unauthorized breaks. Dfts.' Prop. Find. of Fact ¶¶ 53-59, dkt. #23, at 8-9. In addition, in its reply brief, defendant appears to argue that the real problem was not plaintiff's vision impairment but rather his obstinance, carelessness and lack of thoroughness.

To the extent that defendant means to argue that it did not terminate plaintiff because of his disability, I conclude that it has failed to show that there is a genuine issue of material fact with respect to this question. Defendant's owner stated that the "problem" with plaintiff's performance was that he could not see. *See* Dep. of John Buhlman, dkt. #31, Exh. W, at 23-24. This is direct evidence that plaintiff's vision impairment was the reason for his dismissal. *See Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (7th Cir. 2001) (statement of "I fired Judy because she was an old woman" is an example of direct evidence of age discrimination). Although Buhlman's statement does not necessarily demonstrate animus against plaintiff, the ADA prohibits all discrimination against qualified individuals with disabilities, regardless whether the motivation for the decision was prejudice, stereotypes or unfounded fear. *Dadian v. Village of Wilmette*, 269 F.3d 831, 840 (7th Cir. 2001).

In an ADA case, once the plaintiff has offered direct evidence of discriminatory intent, the defendant has the burden to show that it would have made the same decision without regard to the plaintiff's disability. *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 670 (7th Cir. 2000). Defendant has failed to do this.

Defendant's reply brief includes no citations to its proposed findings of fact or to the record to support its argument that deficiencies unrelated to plaintiff's vision impairment were the real reason plaintiff was fired. Furthermore, most of defendant's proposed facts regarding plaintiff's alleged "bad attitude" and other deficiencies are derived from the affidavits of plaintiff's co-workers, who did not participate in the decision to terminate plaintiff. The opinions that plaintiff's co-workers had about the quality of his work are not relevant to determining defendant's motivation for terminating defendant, unless those employees communicated their concerns to a decision maker. *See Biolchini v. General Electric Co.*, 167 F.3d 1151, 1154 (7th Cir. 1999) (views of other employees not relevant to defendant's intent unless decision was tainted by employees' opinions). Defendant proposes no facts that they did.

According to defendant's proposed findings of fact, Smith was the only decision maker who believed that plaintiff had a negative attitude and took too many breaks. More important, defendant has pointed to no evidence showing that Smith expressed his concerns to any of the other supervisors or that, if he did, their decision to terminate plaintiff was influenced by those concerns. Rather, all the available evidence demonstrates that defendant believed that it was plaintiff's vision impairment and not some other deficiency that prevented plaintiff from being

a successful employee. In addition to Buhlman's statement, it is undisputed that, at the time defendant terminated plaintiff, Hemmy told him that his disability was interfering with his work and creating safety concerns. Hemmy later wrote in a memo that plaintiff had been terminated for nondisciplinary reasons. Because defendant has offered no evidence to contradict these statements by the decision makers, I find it undisputed that plaintiff was terminated "because of" his disability.

C. Qualified Individual

Even though defendant's termination was motivated by plaintiff's disability, plaintiff cannot prevail on his claim unless he shows that he is a "qualified individual" under the act. Defendant does not dispute that plaintiff had the necessary skills and experience in order to work as a general laborer in a cheese factory. Presumably, defendant would not have hired plaintiff if it did not believe that plaintiff was qualified. However, defendant does dispute that plaintiff was able to perform all the essential functions of his job.

In determining whether a prescribed duty is an essential function, a court should consider the written job description, experience of others who have held the position and evidence of the judgment of the employer. *Basith v. Cook County,* 241 F.3d 919, 927 (7th Cir. 2001) (citing 29 C.F.R. app. § 1630.2(m)). "'[I]f an employer has a legitimate reason for specifying multiple duties for a particular job classification, duties the occupant of the position is expected to rotate through, a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its

essential duties.'" *Winfrey*, 259 F.3d at 616 (quoting *Miller v. Illinois Dept. of Corrections*, 107 F.3d 483, 485 (7th Cir. 1997)). Although neither party proposed facts regarding the job description or experience of other employees, there is no dispute that the following duties were essential functions of plaintiff's job: picking up and moving cheese materials into forms and then onto racks, flipping the cheese, trimming it with a knife, placing the trimmings in a grinder, moving the cheese forms onto a cart and pushing them into the brine room, stamping the cheese, placing it in a brine tank, turning it, salting it, putting the cheese onto a drying rack and finally onto pallets.

"In ADA cases involving actual disabilities, as opposed to perceived disabilities or a history of a disability, it is usually true that the plaintiff cannot perform the essential functions of the job without some kind of reasonable accommodation." *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 676 (7th Cir. 1998). In this case, however, plaintiff contends that even without an accommodation, he is able to perform the essential functions of the job. He alleges that it is defendant's stereotypical attitude and misunderstanding of his disability rather than an actual inability to perform his job that motivated defendant to fire him. In support, defendant points to his work history as a general laborer, noting that he has never been terminated because of his disability. *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 573 (7th Cir. 2001) (genuine issue of material fact existed with respect to whether plaintiff was qualified individual when there was evidence that she could perform tasks similar to those in dispute). He also points out that no one at Eau Galle told him that his vision impairment was causing problems or that he could be terminated if he did not improve his performance.

Defendant does not dispute plaintiff's successful employment history. It also does not argue that plaintiff's vision impairment is so severe that, as a matter of law, no one with his disability could perform the job duties prescribed to him. *See, e.g., Waggoner v. Olin Corp.*, 169 F.3d 481, 483-85 (7th Cir. 1999) (employee who would miss work "erratically" because of seizures could not be qualified individual); *Sieberns v. Walmart Stores, Inc.*, 125 F.3d 1019, 1022 (7th Cir. 1997) (employee who was completely blind conceded that he could not perform essential functions of sales clerk position). Further, although defendant notes that plaintiff's supervisors made statements to him such as "we've got to be careful," and "take your time," it points to no evidence that anyone told plaintiff his performance was inadequate or that he was in danger of being terminated if he did not improve. However, defendant is correct that its failure to inform plaintiff that there was a problem does not necessarily mean that he was in fact a qualified individual. Defendant argues that plaintiff's work performance during the three weeks he was employed demonstrated that he could not perform the essential functions of the job.

In its brief and proposed findings of fact, defendant alleges that plaintiff "repeatedly" failed to turn all the cheeses on the cart and in the brine tank, left cheeses hanging off the edges of carts and failed to stamp the cheeses or did so improperly. *See* Dfts.' Prop. Find. of Fact ¶¶ 15, 17, 18, 21, dkt. #23, at 4. In addition, defendant alleges that plaintiff was "unable" to properly stack cheese onto pallets, causing the stacks to tip over, and that he was "unable" to "properly" trim the cheeses. *Id.* at ¶¶ 20, 22. The problem with these allegations is that they are not supported by the evidence, at least not to the extent that

defendant asserts. In support of its allegation that plaintiff "repeatedly" failed to turn and stamp cheeses properly, defendant cites only the deposition of John Anibas, one of plaintiff's supervisors. However, Anibas testified only that on the morning of plaintiff's second day, he noticed that "there was cheese missed being turned, misstamped, hanging over the edges on these carts." Dep. of John Anibas, dkt. #23, Exh. E, at 13. Anibas does not indicate how much cheese had not been turned or stamped and he does not say why he believed that it was plaintiff who was responsible for the problems he observed, as plaintiff was not the only employee working in the make room. Further, Anibas also testified that he "pulled [plaintiff] away" from those duties on his second day. Although Anibas stated that *on the second day* he showed plaintiff how to flip the cheeses, there is no testimony that plaintiff continued to perform those duties after the instruction or, if he did continue, that he was still unable to complete them successfully after he received instruction. Evidence that plaintiff may have made mistakes on his first day is not sufficient to show as a matter of law that plaintiff was *unable* to perform his job's essential functions.

With respect to plaintiff's alleged failure to turn the cheeses in the brine tank, defendant cites the deposition of John Buhlman, defendant's owner, who testified that "evidently [plaintiff] missed a lot of them when he turned them." Dep. of John Buhlman, dkt. #23, Exh. G, at 18. However, there is no indication in Bulhman's testimony that he directly observed plaintiff failing to turn the cheese correctly. Rather, Buhlman's use of the word "evidently" suggests that he is relying on information reported to him by another, unnamed source. Generally, "[t]estimony about matters outside [a witness's] personal knowledge is

not admissible and if not admissible at trial neither is it admissible in an affidavit used to support or resist the grant of summary judgment." *Visser v. Packer Engineering Associates*, 924 F.2d 655, 659 (7th Cir. 1991); *see also Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2001) (affidavit of plaintiff referring to conduct of other employees not admissible when it did not explain how she learned about conduct). The personal knowledge requirement applies to depositions and affidavits equally. *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989).

In the context of determining an employer's reasons for terminating an employee, whether the employee *actually* was performing deficiently does not matter so long as the employer *honestly believed* that he was. *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996). For the purpose of determining whether an employee is "qualified" under the ADA, however, the inquiry focuses not on what defendant believed but on plaintiff's actual ability to perform. Thus, defendant cannot rely on hearsay testimony to illustrate that plaintiff is not a qualified individual. Defendant has cited no other evidence to support its contention regarding the brine tank.

With respect to the allegation that plaintiff was "unable to properly trim the cheeses," plaintiff cites an affidavit of another employee. *See* Aff. of Robert J. Pelke, dkt. #26, at ¶ 6. However, the employee does not explain how he knows that plaintiff did not properly trim cheese or, equally important, what it was about plaintiff's technique that was deficient. Affidavits must be made on personal knowledge and contain "specific facts" to be admissible under Fed. R. Civ. P 56(e). *See Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878, 887 (7th

Cir. 1998). ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.") The employee's affidavit contains no specific facts, only a conclusion. Thus, it is not admissible for the purpose defendant wishes it to be used.

The only remaining contention is that plaintiff improperly stacked cheeses, causing them to tip over. In support, defendant again cites the deposition of Anibas. Anibas was asked, "Did you ever have a situation where the pallets were stacked improperly, the pallets that Mr. Hammel worked on, that you recall?" Anibas responded equivocally: "Not that he worked on exactly, no. But it was brought to my attention and pointed [out] to me." Dep. of John Anibas, dkt. #23, Exh. E, at 47. The meaning of Anibas's statement is not immediately clear. In the first sentence, Anibas appears to say, "No, there was no situation in which plaintiff stacked the cheese improperly." However, his second sentence seems to suggest that although he never witnessed plaintiff stacking the cheese improperly, other employees did and told him about it. Assuming that the latter interpretation is the correct one, it does not support defendant's proposed finding of fact. First, Anibas does not appear to have personal knowledge of plaintiff's performance but instead is relying on information of other employees. Even setting aside this problem, Anibas's testimony does not support defendant's allegation that plaintiff's stacks tipped over; at most, it supports an inference that on at least one occasion, plaintiff made a stack that was somehow "improper." Again, however, such testimony controverts the requirement

under Fed. R. [illegible] P. 56 that a party set forth "specific facts" supporting its position on summary judgment.

Defendant has put in virtually no admissible evidence showing that defendant was unable to perform his job's essential functions. I conclude that plaintiff has adduced sufficient evidence to create a genuine issue of material fact on this issue. However, I cannot conclude that plaintiff has proven as a matter of law that he can perform the job's essential functions without an accommodation. Thus, I will deny both parties' motions for summary judgment on the issue whether plaintiff is qualified without an accommodation.

D. Reasonable Accommodation

Assuming that the jury rejects plaintiff's claim that he is qualified *without* an accommodation, I must consider whether plaintiff is qualified *with* an accommodation. Unlike Title VII or the ADEA, the ADA requires more than equal treatment for disabled and nondisabled employees. Rather, recognizing that generally applicable practices and policies can have unfairly burdensome effects on individuals with disabilities, Congress included the failure to provide a reasonable accommodation in the ADA's definition of discrimination.

In the context of the work environment a "reasonable accommodation" is a "modificatio[n] or adjustmen[t] to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. app. § 1630.2(o)(ii); *see also Vande Zande v. State of Wisconsin Dept. of Administration*, 44 F.3d 538,

543 (7th Cir. 1995) ("It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms and conditions in order to enable a disabled individual to work.") A reasonable accommodation may include a transfer to a vacant position, *e.g., Rehling v. City of Chicago,* 207 F.3d 1009, 1014 (7th Cir. 2000), additional training, *e.g., Schmidt v. Methodist Hospital of Indiana, Inc.,* 89 F.3d 342, 344-45 (7th Cir. 1996), restructuring the job, *Feliberty v. Kemper Corp.,* 98 F.3d 274 (7th Cir. 1996), or simply "sitting down . . . and talking about the situation," *Bultemeyer v. Fort Wayne Community Schools,* 100 F.3d 1281, 1285 (7th Cir. 1996); *see also* 42 U.S.C. § 12112(9) (providing examples of reasonable accommodations). However, an accommodation is not reasonable if providing it would eliminate an essential function of the job. *Ross v. Indiana State Teacher's Association Insurance Trust,* 159 F.3d 1001, 1015-16 (7th Cir. 1998) (request of teacher's association director to have all teachers' meetings in his office not reasonable accommodation when essential function of job was to meet with teachers outside his office).

Plaintiff has the initial burden to show that an accommodation is reasonable. *Vande Zande,* 44 F.3d at 543. The Court of Appeals for the Seventh Circuit has interpreted "reasonable" to mean both "efficacious" and "proportional to costs." *Oconomowoc Residential Programs v. City of Milwaukee,* 300 F.3d 775, 784 (7th Cir. 2002) (citing *Vande Zande,* 44 F.3d at 543). Once plaintiff makes this showing, defendant has the burden to demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

Defendant argues initially that plaintiff cannot meet his burden because it attempted to accommodate him by reassigning him to different tasks, but plaintiff never measured up regardless which job he was placed in. Assuming that plaintiff did need an accommodation, defendant does not immunize itself from liability under the ADA simply by implementing *an* accommodation. Neither the employee nor the employer may unilaterally determine what constitutes a reasonable accommodation under the act. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998). The court of appeals has held in numerous cases that an employer must engage in an "interactive process" with the employee to determine what an appropriate accommodation would be. *Corder v. Lucent Technologies Inc.*, 162 F.3d 924, 928 (7th Cir. 1998); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996). The employer has a "duty to consult with the employee to determine the precise job-related limitations imposed by the disability and how those limitations could be overcome with a reasonable accommodation." *Lenker v. Methodist Hospital*, 210 F.3d 792, 797 (7th Cir. 2000).

In many cases, an employee must request an accommodation before the employer's duty is triggered. *See, e.g., Sieberns*, 125 F.3d at 1023. In this case, however, it would not be reasonable to require plaintiff to request an accommodation when he did not think he needed one and defendant never informed him until his termination that his disability was interfering with his job. When an employer knows that an employee is disabled and believes the disability is preventing him or her from performing the job's essential functions, the employer should put the

employee on notice that there is a problem. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act,* at Question 40 (October 17, 2002). By failing to provide plaintiff with this information, defendant caused a breakdown in the interactive process. *Beck,* 75 F.3d at 1136.

However, defendant's failure to engage in an interactive process is not sufficient on its own to establish liability. *Rehling,* 20 F.3d at 1016. Plaintiff must show that had defendant engaged in the process, together they could have identified a reasonable accommodation. *Mays v. Principi,* 301 F.3d 866, 870 (7th Cir. 2002). Although plaintiff has not personally identified accommodations that could have been made, he points to the affidavit of Richard Davis, who is the assistant director of Blind, Inc., and a professional consultant on blindness and rehabilitation. It is undisputed that had defendant told plaintiff that there was a problem, he could have contacted Blind, Inc. or a similar agency for assistance. After visiting defendant's facility in Durand, Wisconsin, Davis concluded that there were a number of simple techniques that could be implemented to insure that plaintiff's vision impairment did not prevent him from properly stacking, flipping or stamping cheese. Davis also suggested that plaintiff's work be inspected as he was working so that he could be shown how to hold the stamp if he was doing it incorrectly. Aff. of Richard Davis, dkt. #37, at ¶ 5.

The only evidence that defendant has submitted to dispute Davis's suggestions is an affidavit of Ron Hemmy, in which he avers that the proposed accommodations would have been "unworkable or ineffectual." Aff. of Ron Hemmy, dkt. #42, at ¶ 5. Again, defendant's conclusory

assertion does satisfy the requirement for "specific facts" under Rule 56.

Defendant argues also that Davis's suggestion to supervise plaintiff while he is stamping is "unreasonable, in that it would take almost as much time to check the stamps as to stamp the cheese in the first place." Dfts.' Reply Br, dkt. #40, at 6. Defendant does not support this assertion with any citation to the record. Furthermore, plaintiff is not asking for a full-time babysitter. *See Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996) (request to have full time helper not reasonable accommodation). At most, plaintiff is requesting someone to monitor his technique at first to insure that he is performing the task properly. It makes eminent sense to work with the employee initially, particularly when an employee is visually impaired,. It is surprising that, even on plaintiff's first day, defendant seemed to give plaintiff little if any supervision. A reasonable jury could find that plaintiff's proposed accommodations were both efficacious and proportional to costs. Again, however, I cannot conclude that plaintiff has established this as a matter of law. "Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties." *Oconomowoc Residential Programs*, 300 F.3d at 784. In this case, this is a determination properly left to the jury.

In addition to challenging Davis's suggestions directly, defendant argues that even if the proposed accommodations would be effective with respect to plaintiff's vision impairment, plaintiff will still not perform adequately because the real problem is his "carelessness." Defendant appears to be confusing the issue whether plaintiff can perform the job's essential functions with whether plaintiff

was terminated "because of" his disability. The "qualified individual" analysis focuses on whether plaintiff's disability prevents him from performing his prescribed duties, *not* on whether defendant may have had other reasons for terminating him. Furthermore, as noted above, defendant has not pointed to *any* evidence that would suggest that plaintiff was fired because he was viewed as careless. Rather, the facts show that defendant fired plaintiff because of his vision impairment. A conclusory assertion in a reply brief does not create a genuine issue of material fact on that question.

E. Direct Threat

Even when an individual with a disability is a qualified individual, an employer may terminate that individual if he or she poses a "direct threat" to health or safety. 42 U.S.C. § 12113(b). The ADA defines "direct threat" as a "a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3) (emphasis added). However, the Supreme Court has affirmed the EEOC's interpretation of 42 U.S.C. § 12113(a), which permits employers to apply "qualification standards" that are "job-related and consistent with business necessity," to include a defense for employers when the employee is a direct threat to him or herself. *Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73, 122 S. Ct. 2045 (2002).

Defendant proposes facts that plaintiff was a direct threat to himself and his co-workers because he dropped cheeses "heavily" on the table, put his hands too far into the cheese grinder, scraped his knuckles on equipment, bumped into other employees, bumped his head on carts,

tripped over hoses, did not use "caution as to where he was waving the knife in relation to the location of his co-workers," once carried a knife outward instead of inward and once ran a pallet jack into the wall. Dfts.' Prop. Find. of Fact ¶¶ 23-46, dkt. #23, at 5-7.

A preliminary question is whether plaintiff or defendant has the burden of proof on this issue. Defendant suggests that the direct threat analysis should be determined in the context of whether plaintiff is a qualified individual and thus he should have the burden of proof. Dfts.' Br., dkt. #22, at 2. I disagree; the statute expressly places the burden of proof for demonstrating a direct threat on employers. 42 U.S.C. § 12113(b). In the most recent Supreme Court case that addressed the issue of direct threats under the ADA, the Court noted that the existence of a direct threat is an affirmative defense. *Chevron*, 122 S. Ct. at 2049; *see also Bragdon v. Abbott*, 524 U.S. 624, 652-53 (1998) (noting that party asserting existence of direct threat had burden of establishing that there was genuine issue of material fact); *Dadian v. Village of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001) ("[I]t is the employer's burden to show than an employee posed a direct threat to workplace safety that could not be eliminated by reasonable accommodation.") Nevertheless, relying on a dissenting opinion from the Court of Appeals for the Fifth Circuit, defendant argues that when an employee's essential job functions involve safety, the burden should be on the plaintiff to show that he or she can perform the essential functions of the job without imposing a direct threat. *See Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209 (5th Cir. 2000) (Jones, J., dissenting).

There may be some instances in which there is an overlap of the question whether an employee can perform the essential functions of a job and the question whether he or she is a direct threat, requiring the court to decide which party has the burden of proof. *See Emerson v. Northern States Power Co.*, 256 F.3d 506, 513 (7th Cir. 2001) (declining to decide whether plaintiff's ability to handle "safety-sensitive" calls is more appropriately addressed under "qualified individual" analysis or "direct threat" analysis); *but see Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (citing 29 C.F.R. § 1630.2(r), which places burden on defendant to prove that employee cannot "safely perform the essential functions of the job"). If there is such a case, this is not one of them. Defendant has not argued that maneuvering a pallet jack or stepping over hoses without tripping are "essential functions" of the job. If the burden of proof is placed on plaintiff in this case, it would be very difficult to imagine any situation in which the employer would have to prove the existence of a direct threat. Such a result would be inconsistent with the plain language of the statute. The burden to prove a direct threat remains with defendant.

An initial problem with defendant's proposed findings of fact regarding the danger that plaintiff allegedly created is that, again, they are not all supported by the record. For instance, to support its allegation that plaintiff "dropped the cheeses heavily onto the table," defendants cites the depositions of Anibas and Hemmy. The page in Anibas's deposition cited by defendant has no reference to dropping cheese, heavily or otherwise. *See* Dep. of John Anibas, dkt. #23, Exh. E, at 25. In Hemmy's deposition, he testified only that Smith told him that he was *worried* plaintiff would drop a cheese form on himself or a co-worker, not

that he actually had done so or that he dropped forms any more heavily than the other employees. *See* Dep. of Ron Hemmy, dkt. #23, Exh. D, at 52.

Defendant cites the same sources to support its allegation that plaintiff was not cautious in using the trimming knife. Hemmy's deposition does not refer to any problems regarding the way plaintiff used a knife. Anibas testified only that other employees did not want to work by plaintiff because they observed that "he wasn't watching where everybody was when he would swing with it." Once again, I must remind defendant that testimony is not admissible unless the witness has personal knowledge of the facts. Anibas cannot testify to what other employees saw, only what he observed personally.

Defendant has supported with admissible evidence its remaining proposed findings of fact regarding safety concerns. Plaintiff attempts to dispute these facts, but he does so unsuccessfully. For example, plaintiff states that he "does not recall" bumping into other workers or bumping his head. In this circuit, however, a statement that one does not recall an event occurring is insufficient to create a genuine dispute. *Tinder v. Pinkerton Security,* 305 F.3d 728, 736 (7th Cir. 2002); *see also Federal Election Commission v. Toledano,* 317 F.3d 939, 949-50 (9th Cir. 2002); *Dickey v. Baptist Memorial Hospital-North Mississippi,* 146 F.3d 262, 266 n.1 (5th Cir. 1998); *but see Roth v. G.D. Searle & Co.,* 27 F.3d 1303 (8th Cir. 1994) ("By arguing that she does not recall being informed of the risk of PID, Ms. Roth placed at issue the caliber of the warnings she received.") A statement of "I don't recall," suggests a "mere possibility" of a dispute, which not does satisfy the requirements of Rule 56. *Posey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir. 1983).

In attempting to dispute the remainder of defendant's proposed findings of fact, plaintiff either provides no citation to the record or cites his affidavit, in which he avers that defendant's allegations are "untrue or over-exaggerated." Aff. of Paul Hammel, dkt. #36, at ¶ 11. However, he does not identify which allegations are false and which are exaggerated. He provides no specific facts at all. General averments are insufficient to show a genuine dispute. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990).

Thus, I view as undisputed the facts that plaintiff frequently stumbled, bumped into other employees and carts, bumped his head on carts and tripped over hoses, that other employees bumped into each other in order to avoid him, that at least once, he scraped his knuckles on equipment, that one employee saw plaintiff carrying his trimming knife outward instead of inward and once saw him run a pallet jack into the wall and that Simpson and Buhlman believed that plaintiff put his hands too far into the grinder. However, I conclude that these facts are insufficient to show a genuine issue whether plaintiff posed a direct threat to health or safety.

Whether the employer alleges that the employee is a direct threat to himself or to others, the employer must demonstrate that both the risk of danger and the potential harm are "significant." *Chevron U.SA., Inc.*, 122 S. Ct. at 2050 n.3; *Bragdon*, 524 U.S. at 649 ("Because few, if any, activities in life are risk free . . . the ADA do[es] not ask whether a risk exists, but whether it is significant."); *see also Emerson*, 256 F.3d at 514 (direct threat determined by (1) duration of risk, (2) nature and severity of potential harm, (3) likelihood of harm and (4) imminence of harm). In addition, the assessment must be " 'based on a reasonable

medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." *Chevron U.S.A., Inc.*, 122 S. Ct. at 2053 (quoting 29 C.F.R. § 1630.2(r) (2001)). A good faith belief unsupported by objective evidence is insufficient. *Bragdon*, 524 U.S. at 649.

With regard to the stumbling, bumping and tripping, I conclude that these do not constitute a direct threat under the ADA. Defendant has not submitted any evidence that plaintiff or any of his co-workers have been hurt by these events or that there was a risk they would be. Particularly in light of the undisputed fact that defendant's factory is not a "gentle environment," a brush on the shoulder cannot be considered a significant harm. At most, these are minor inconveniences, not direct threats. Similarly, scraping a knuckle and running a pallet jack into the wall are not direct threats. Furthermore, plaintiff suggests that difficulties with the pallet jack could be addressed by allowing him to use a manual pallet jack, at least at first, to reduce any risk of danger. In the alternative, because defendant does not identify running a pallet jack as an essential function, any risk that using the pallet jack creates could be eliminated by reassigning that job duty to someone else. *See U.S. EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1284 (7th Cir. 1995) (reasonable accommodations include eliminating non-essential job functions that pose direct threat).

The remaining concerns are the way plaintiff carries his knife and uses the cheese grinder. It cannot be disputed that a knife wound or the loss of a finger are significant harms. The question is whether defendant has shown, through objective evidence, that there was also a significant risk that one of these events would occur.

Plaintiff argues that it has not, emphasizing that he has never hurt himself or another employee while using knives or the grinder. Although this is certainly relevant in determining whether plaintiff posed a direct threat, it is not dispositive. An employer does not have to wait until there has been a serious accident before it takes corrective action. *See, e.g., Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 671-72 (7th Cir. 2000) (doctor suspected of drinking on the job was direct threat even though he had not yet injured anyone). However, I cannot conclude that because one employee observed plaintiff carrying a knife pointed outward *on one occasion* that he posed a significant safety risk. The problem with the cheese grinder may be a closer call as it appears that plaintiff was observed on several occasions by different people pushing his hands "too far" into the grinder, at least in their view. It is arguable that Simpson's and Buhlman's opinion that plaintiff was endangering himself does not satisfy the requirement for "objective evidence." *See Bragdon*, 524 U.S. at 649-50 (concluding that dentist's own opinion that patient with HIV would pose direct threat was not objective evidence). Assuming that it does, however, plaintiff has suggested that the safety risk could be eliminated by providing plaintiff with a wooden pestle to push the cheese into the grinder so that he would not have to gauge the distance by sight. Defendant presents no evidence that this accommodation would be unreasonable, other than to argue again that plaintiff is "uncooperative."

Defendant's only remaining evidence is that some of the employees felt uncomfortable working with plaintiff because they thought he was a danger. However, as discussed throughout this opinion, there appears to be little objective evidence to support their fear. The court of

appeals has recognized that "a non-disabled person's instincts about the capabilities of a disabled person are often likely to be incorrect." *Hoffman*, 256 F.3d at 573. This unfamiliarity with disabled individuals may cause co-workers to be uncomfortable or even afraid. Although perhaps understandable, this generalized anxiety about working with a disabled person is not a sufficient reason to terminate an employee under the ADA. A determination that an employee is a direct threat must be based on objective evidence, not unfounded fear. *See Washington v. Indiana High School Athletic Association, Inc.* 181 F.3d 840, 851 (7th Cir. 1999) (quoting 28 C.F.R. Pt.35, App.A) ("The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.")

Therefore, with respect to the issue whether plaintiff posed a direct threat to health or safety at the time defendant terminated him, defendant's motion for summary judgment will be denied and plaintiff's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendant Eau Galle Cheese Factory is GRANTED with respect to plaintiff's claim under the Wisconsin Fair Employment Act. That claim is DISMISSED for lack of subject matter jurisdiction. Defendant's motion is DENIED in all other respects.

2. The motion for summary judgment filed by plaintiff Paul Hammel is GRANTED with respect to the issue whether plaintiff posed a direct threat to the health or safety of himself or others at the time defendant terminated him. Plaintiff's motion is DENIED in all other respects.

Entered this 15th day of April, 2003.

BY THE COURT:

/s/ Barbra B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL HAMMEL,

Plaintiff,

v.

EAU GALLE
CHEESE FACTORY,

Defendant.

JUDGMENT IN A CIVIL CASE

Case No. 02-C-405-C

This action came for consideration before the court with District Judge BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of defendant Eau Galle Cheese Factory and against plaintiff Paul Hammel on plaintiff's claim that defendant terminated him in violation of the Americans with Disabilities in Employment Act.

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz,
Clerk of Court

JUN 27 2003
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL HAMMEL,

Plaintiff,

OPINION and ORDER

02-C-0405-C

v.

EAU GALLE CHEESE FACTORY,

Defendant.

In this civil action, plaintiff Paul Hammel alleged that defendant Eau Galle Cheese Factory had terminated him because of his blindness, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Before trial, I granted plaintiff's motion for summary judgment in part, finding that plaintiff was an individual with a disability of legal blindness, that defendant was aware of plaintiff's disability and that defendant fired plaintiff because of his disability. I found also that no reasonable jury could find in favor of defendant on its affirmative defense that plaintiff posed a direct threat at the time he was terminated. The only issue left for trial was that of plaintiff's qualifications for the job of laborer at the cheese factory. Following trial, I entered an opinion and order in which I found that plaintiff was not a qualified individual because he was not capable of performing the essential functions of his job, with or without a reasonable accommodation. I found that it was not possible to know from the evidence to what extent plaintiff's inability to perform properly was caused by his blindness and to what extent by his unwillingness to accept direction and his lack of motivation but that it was not necessary to sort out the

contributing factors. In combination, they prevented plaintiff from performing the cheese factory job and plaintiff's expert's suggested accommodations would not have enabled him to do so.

Objecting to the decision, plaintiff has filed a timely motion to alter the judgment or in the alternative for a new trial, pursuant to Fed. R. Civ. P. 52 and 59. He argues that it was error for the court to find that he was not a qualified individual. He contends that the court should have granted his motion for a judgment as a matter of law at the conclusion of his case-in-chief because he proved the elements of his claim: (1) he had years of experience in general laborer positions and was qualified in terms of training and experience for his position with defendant; (2) the evidence he presented established that defendant could have implemented reasonable accommodations that would have helped him perform capably; and (3) defendant never told him he was performing inadequately and was in danger of losing his job and never initiated any discussion with him about possible accommodations.

The evidence at the conclusion of plaintiff's case was not as clear cut as plaintiff makes it out to be. A significant question remained about his ability to perform the essential functions of the cheese factory job. Defendant believed that he possessed the appropriate educational background, employment experience and skills; otherwise, it would not have hired him. What was unclear was the extent to which he could perform the essential tasks he was hired to perform. Plaintiff's evidence did not resolve that question. There was testimony that plaintiff had bumped into carts, failed to stack the rounds of cheese on the carts properly, failed to turn the rounds as required and performed some tasks too slowly to keep up with production demands. I

was not persuaded at the conclusion of plaintiff's case that he was entitled to judgment as a matter of law and I have not changed that opinion in light of plaintiff's motion to amend the judgment.

As a second ground for the motion to amend or alter the judgment, plaintiff argues that the court erred in considering other reasons that defendant may have had for firing him rather than focusing on whether his *disability* prevented him from performing adequately. Plaintiff says that the court found that he was not a qualified individual under the Americans with Disabilities Act because his bad attitude prevented him from being able to perform the essential functions of his job. That is not an accurate characterization of the finding. It was that it was not possible to sort out the causes for plaintiff's inability to perform properly and that it was not necessary to do so because "[e]ven if plaintiff had been physically capable of performing the essential tasks of his job, he was not a qualified individual under the ADA because of his unwillingness to make the adaptations, take the care or exert the effort necessary to allow him to perform the essential elements of the job." June 26 Order and Op., dkt. # 78, at 2.

Not surprisingly, plaintiff places great emphasis on the court's alleged error in considering his lack of motivation and unwillingness to accept instruction in finding him unqualified to perform the essential functions of the job. Plaintiff cites a number of cases in which courts have focused only on the plaintiff's physical or mental capability to perform a particular job and have not considered whether the plaintiff has performance problems. However, those cases offer no assistance because they do not include any discussion of the interplay of disability and lack of

motivation. Plaintiff's case is unusual, if not unique. In the vast majority of Americans with Disabilities cases, the issue of lack of motivation or willingness to accept instruction and criticism never arises and the only question is whether the plaintiff's physical or mental disabilities prevent him from performing the essential duties of the job with or without reasonable accommodation. In plaintiff's case, however, the employer was dealing with an employee who not only had severe vision problems but lacked motivation to learn the routine of his job, to take steps to accommodate his vision problems and to use care in working. What his employer saw was an employee who ran a pallet of cheese rounds into the wall, dropped rounds of cheese onto the table tops, used the cheese grinder in an unsafe manner, could not be counted on to trim the cheese rounds carefully or turn and stack the rounds properly, bumped into the racks of cheese on a frequent basis and had many near-misses with his coworkers as they walked around the make room. When he failed to improve his work performance in response to suggestions from his coworkers, defendant concluded that his blindness disqualified him from the position of general laborer. Defendant might have been wrong about its conclusion; an equal or even bigger reason may have been plaintiff's attitude. (Plaintiff's work attitude may have been the result of mental and emotional problems that disabled him from holding a long term job. From the present record there is no way of knowing that, although plaintiff's work history suggests that it may be true.) Whether defendant made an accurate evaluation of the causes of plaintiff's inability to perform his job does not matter. In either case, plaintiff was not qualified for the position.

In the June 26 opinion and order, I agreed with plaintiff that defendant had failed to carry out its duty to initiate discussions with plaintiff about possible accommodations it could make to ease plaintiff's difficulties. Certainly defendant would have a stronger position in this lawsuit had its manager talked with plaintiff about his vision problems and consulted with someone knowledgeable about blind workers in a factory setting. At the least, this might have given defendant a clearer understanding of the reasons for plaintiff's poor performance, that is, what part was attributable to his vision problems and what part was caused by his attitude. However, defendant's failure to engage in the accommodation process does not require a finding in plaintiff's favor unless plaintiff can show that accommodations existed that would have enabled him to perform his job tasks adequately. Plaintiff had not made that showing. His expert identified only two steps that defendant could have taken, along with several adaptive steps that *plaintiff* could have taken, none of which involved any special equipment or changes in factory procedures. Plaintiff spent eight to nine months at BLIND, Inc., a rehabilitation center, where he was taught techniques to compensate for his loss of vision, and spent time at both DAC and Ability Building Center, two other programs that worked with persons with disabilities. He has had many opportunities to learn adaptive measures. Defendant never prevented him from making use of the measures he had learned. At trial, plaintiff noted, for example, that when he had worked at Ralston-Purina, he had worn a baseball cap to protect his head from bumping. Tr. Trans. I-A-77. He could have worn the same protective headgear at the cheese factory to avoid hitting his head against a cheese rack.

Plaintiff argues that the holding in this case will allow employers to avoid discussing possible accommodations for disabled employees because the employers can say that the employee had such a bad attitude that no reasonable accommodation would have worked. Plaintiff's fears are overblown. An employer cannot avoid liability simply by saying that an employee had such a bad attitude that no reasonable accommodation was possible. At a minimum, the employer has to prove that the employee did have a bad attitude, tie it to a particular accommodation and show why that accommodation would not have worked in light of the employee's attitude.

The steps that plaintiff's expert identified for defendant to take were directed toward the stamping process and the presence of hoses on the floor. Defendant had responded to the stamping problems by relieving plaintiff of this task and plaintiff's expert acknowledged that plaintiff could adapt to the hose problem by shuffling as he walked. In this case, I cannot conclude that a "reasonable accommodation" includes those actions that the employee himself could have taken to improve his performance.

Nothing in plaintiff's motion for alteration of the judgment persuades me that the judgment should be amended in any respect. That motion will be denied.

In support of the motion for a new trial, plaintiff argues that once the court had decided his motion for summary judgment and held that defendant terminated him because of his blindness, it was prejudicial error to allow defendant to present evidence about his reckless behavior, refusal to follow job directions and bad attitude. This was particularly true, plaintiff maintains, after the court refused to reverse its decision on summary judgment

in response to defendant's motion for reconsideration filed just before trial began.

This argument is a variation of the one that plaintiff advanced in support of its motion for alteration or amendment of the judgment. It rests on plaintiff's argument that a court is limited to considering only disability when evaluating an employee's qualifications to perform in the work setting. As I have explained, I am not persuaded either that an employer is limited in this way or that an employer is required to sort out the precise causes of an employee's inadequate performance. (This does not mean that an employer is not required to initiate discussions with an employee about a disability and implement reasonable accommodations for the employee once the employee makes the employer aware of a disability.) It was not unfair prejudice to plaintiff to allow defendant to introduce evidence of plaintiff's carelessness, refusal to take instruction and apparent lack of motivation to perform his work properly. It is true that the evidence was not relevant to defendant's decision to fire plaintiff because that issue had been decided, but it was relevant to plaintiff's qualifications to perform the essential tasks of his job, which was the issue left open for trial.

Plaintiff argues that the court erred in allowing defendant to introduce evidence that plaintiff had received $5,000 from his family for providing care for his father. Plaintiff objects to any consideration of this evidence. He alleges that defendant's counsel acted improperly in persuading plaintiff's brother to send her a copy of the letter he wrote plaintiff at the time he sent the money and that she failed to disclose the document to plaintiff in response to plaintiff's Fourth Request for Production of Documents, served on defendant on April 19, 2001. Defendant's

counsel denies that she did anything improper in securing the letter but does not deny that it was covered by the request for production. Instead, she argues that the evidence was used for impeachment only and therefore, she did not have to produce it in advance of trial and, moreover, admission of the evidence was not prejudicial to plaintiff.

It appears from defendant's counsel's contemporaneous notes that she was forthright in her discussions with plaintiff's brother. He may have misunderstood her position but if so, it does not seem to have been as a result of any misrepresentations that she made to him. As to the letter, defendant was under an obligation to turn it over if it was covered by the request for production of documents, even if she intended to use it solely for impeachment purposes. Although Fed. R. Civ. P. 26(a)(1) and (3) exempts materials to be used solely for impeachment purposes from initial and pretrial disclosures, there is no similar exemption in Fed. R. Civ. P. 34, which covers requests for the production of documents.

Plaintiff asks the court to sanction defendant for its action in introducing the letter after withholding it from plaintiff. This request will be denied for two reasons. First, plaintiff's counsel was given an opportunity to advise the court before the end of trial if he could find the request for production that covered the letter; he did not do so. Second, the letter had no effect on the outcome of the trial. Plaintiff's credibility would have been badly damaged without the introduction of the letter, given the number of instances in which defendant was able to show that he had been less than candid about important matters, such as his prior work history.

I note however, that plaintiff is in a difficult position to assert undue surprise when he was the one who received the gift from his family. Had he told the truth when he was asked about it, defendant would have had no basis upon which to introduce the letter to the contrary.

Plaintiff contends that he is entitled to a new trial because the court erred in limiting his expert witness's testimony. The witness's testimony was limited to the opinions he had included in the report turned over to defendant in advance of trial and in an affidavit he had prepared three months before trial in opposition to defendant's motion for summary judgment. This was not an error; it was an appropriate response to plaintiff's expert's failure to keep defendant apprised of the changes in his opinions. The expert was not allowed to testify about what stereotypes defendant might have held about blind persons because his testimony was based upon the stereotypes that persons in general have about blind persons. Such evidence would not have been relevant to determining what defendant thought about plaintiff.

Finally, plaintiff argues that the court erred in allowing Michael Berger to testify about plaintiff's work experience immediately prior to his employment with defendant. Although I do not agree that it was error to allow him to testify for impeachment purposes even if defendant did not supply his name to plaintiff before trial, his testimony did not affect the outcome of the case. As the June 26 order indicates, plaintiff's prior experience at the lumber yard served merely to provide support for defendant's assessment of his abilities. It was not of any independent probative value in determining whether plaintiff had shown that he was qualified to perform the essential tasks of the job of general laborer.

In summary, I conclude that plaintiff has failed to show that he is entitled to a new trial.

ORDER

IT IS ORDERED that plaintiff Paul Hammel's motion for alteration of the June 27, 2003 judgment or, in the alternative, for a new trial is DENIED.

Entered this 27th day of August, 2003.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 24, 2005

Before

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Nos. 03-3578 & 03-3687

PAUL S. HAMMEL,
Plaintiff-Appellant, Cross-Appellee,

v.

EAU GALLE CHEESE FACTORY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 02 C 0405 C

Barbara B. Crabb,
Chief Judge.

ORDER

On May 11, 2005, the plaintiff-appellant, Paul S. Hammel filed a petition for rehearing en banc in response to our decision affirming the district court's ruling in favor of the defendant-appellee under the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq.* All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore DENIED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

CORRECTED JUDGMENT
WITH ORAL ARGUMENT

Corrected Date: June 8, 2005

BEFORE: Honorable JOEL M. FLAUM, Chief Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

Nos. 03-3578 & 03-3687

PAUL S. HAMMEL,
Plaintiff-Appellant, Cross-Appellee,

v.

EAU GALLE CHEESE FACTORY,
Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court for the Western District of Wisconsin.
No. 02 C 405, Barbara B. Crabb, Chief Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on May 11, 2005.

(1182-110894)

42 U.S.C.A. § 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for

each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting

commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when

considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Current through P.L. 109-57 approved 08-02-05

42 U.S.C.A. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results

accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program

available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Current through P.L. 109-57 approved 08-02-05

29 C.F.R. § 1630.2 Definitions.

<For statute(s) affecting validity, see: 42 U.S.C.A. § 12102.>

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer –

(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include-

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual –

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking,

seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits –

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working –

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job

does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

(n) Essential functions –

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that

enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship –

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered

in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements

established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

[SEAL] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1411
TDD: (414) 297-1415
FAX: (414) 297-4133/3146

Charge Number: 26GA00774
FEPA Number: 200000674

Paul S. Hammel
Route 1 Box 44A
Zumbro Falls MN 55991 Charging Party

vs.

Eau Galle Cheese Factory
N6765 State Hwy 25
Durand WI 54736

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under the Americans with Disabilities Act of 1990 (ADA).

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of the ADA in that the Respondent refused to accommodate his disability and terminated his employment as a general labor on January 27, 2000.

During the investigation, relevant, available witnesses were interviewed, and relevant documents were reviewed. I have considered all the evidence disclosed during the

investigation and find that there is reasonable cause to believe that there is a violation of the Americans with Disabilities Act of 1990. Evidence reveals that the Respondent discharged the Charging Party prior to making a reasonable attempt to accommodate his disability.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. The Commission will also consider compensatory and punitive damages under the Civil Rights Act of 1991.

If the Respondent declines to discuss settlement or if, for any other reason, a settlement acceptable to the Office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

On behalf of the Commission.

MAR 29 2002
Date

/s/ [Illegible]
Chester V. Bailey
District Director

cc: Scott C. LaBarre, Attorney
1660 South Albion, Suite 918
Denver, CO 80222

cc: Carol S. Dittmar
Garvey, Anderson, Johnson, Geraci & Mirr
402 Graham Avenue
Eau Claire, WI 54702-0187

[SEAL] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1411
TDD: (414) 297-1415
FAX: (414) 297-4133/3146

Charge Number: 26GA00774
Paul S. Hammel
vs.
Eau Galle Cheese Factory

Paul S. Hammel
Route 1, Box 44A
Zumbro Falls, MN 55991

Dear Mr. Hammel:

The Commission has determined that its efforts to conciliate this charge as required by Title I of the Americans with Disabilities Act of 1990 have been unsuccessful: This letter constitutes the notice required by the Commission's Regulations which provides that the EEOC shall notify a Respondent in writing when it determines that further conciliation efforts would be futile or non-productive.

The Commission will not make further efforts to conciliate this charge. The Commission has also determined that it will not institute a lawsuit in this case.

This concludes the processing of this charge. **This letter will be the only notice of the Charging Party's right to sue sent by the Commission. THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN U.S. DISTRICT COURT**

WITHIN 90 DAYS OF HIS/HER RECEIPT OF THIS LETTER. Therefore, if a suit is not filed within this 90-day period, the Charging Party's right to sue will be lost.

Sincerely,

APR 19 2002
Date

/s/ [Illegible]
Chester V. Bailey
District Director

cc: Scott C. LaBarre, Attorney
1660 South Albion, Suite 918
Denver, CO 80222

cc: Carol S. Dittmar
Garvey, Anderson, Johnson, Geraci & Mirr
402 Graham Avenue
Eau Claire, WI 54702-0187

Tommy G. Thompson
Governor

Linda Stewart, Ph.D.
Secretary

J. Sheehan Donoghue
Division Administrator

EQUAL RIGHTS DIVISION
1 S Pinckney Street, Rm 320
P.O. Box 8928
Madison, WI 53708-8928
Telephone: (608) 266-6860
FAX: (608) 267-4592
TTY: (608) 264-8752
http://www.dwd.state.wi.us/
(TTY-Hearing Impaired Callers)

[LOGO]

State of Wisconsin
Department of Workforce Development

DATED AND MAILED OCT 05 2000

Paul Hammel
Rural Route 1, Box 44A
Zumbro Falls MN 55991
Complainant

vs.

Eau Galle Cheese Factory, Inc.
N6765 State Highway 25
Durand WI 54736
Respondent

INITIAL DETERMINATION – NO PROBABLE CAUSE

ERD Case No. 200000674
EEOC Case No. 26GA00774

I. THE DIVISION DECIDED:

There is no probable cause to believe Eau Galle Cheese Factory, Inc. violated the Wisconsin Fair Employment Law, sec. 111.31-111.395, Stats., by:

A. terminating the employment of the Complainant because of disability.

The complaint is therefore *dismissed*.

II. THIS MEANS:

No reason was found to believe a formal hearing should be held on the complaint and the Division is dismissing the complaint.

III. THE NEXT STEP IS:

The dismissal will become final unless written appeal is received by the Equal Rights Division, P.O. Box 8928, Madison, Wisconsin 53708, within 30 days of the date this determination was mailed. (The DATE OF MAILING is stamped at the top of the Initial Determination.) The appeal must state the specific reasons why you are appealing.

If a timely appeal is filed, this case will be certified to the Hearing Section for a hearing on the issue of probable cause. If no timely appeal is received, the Department will close this case without further action.

IV. THE DIVISION DECIDED THERE WAS NO PROBABLE CAUSE BECAUSE:

A. The Respondent, Eau Galle Cheese Factory, Inc. (Eau Galle Cheese or EGC), employed the Complainant, Paul Hammel (Hammel), from January 8, 2000, until his discharge on January 27, 2000.

B. Located in Durand, Wisconsin, Eau Galle Cheese is a cheese manufacturing facility employing approximately 20 people in its manufacturing division. Hammel was hired as a general laborer in the manufacturing division. General laborers at Eau Galle Cheese rotate from position to position in the production area and are expected to be able to perform all jobs within the rotation. Ron Hemmy (Hemmy), EGC's business manager, explained the duties of a general laborer to Hammel at the time of his hire.

C. Hammel is a disabled person who has a visual impairment. As a result of glaucoma, he has less than 20 degrees of field vision in his left eye. His right eye has been removed and replaced with a prosthetic. Hammel informed Eau Galle Cheese of his visual impairment when he was hired.

D. Hammel claims that despite performing his job duties satisfactorily, he was dismissed because Eau Galle Cheese was concerned something bad might happen to him or his co-workers as a result of his vision problems. At the time of his discharge, Hammel had not done anything to cause injury to himself or any other employee.

E. EGC disputes Hammel's assertion that he performed his job duties satisfactorily. Eau Galle Cheese has two primary work areas – the brine room and the make room. EGC says it attempted to use Hammel in both places and had other employees assist him, but he was not able to adequately do the work. Eau Galle Cheese states that Hammel had difficulty stacking cheeses correctly, turning cheese in the brine room, operating a cheese grinder, and moving around the wash hoses on the floor. Eau Galle Cheese states Hammel was seen bumping into his fellow employees, equipment, and movable carts. His actions caused other employees to be concerned about their safety. EGC also notes that Hammel would leave his workstation for unscheduled cigarette breaks.

F. Eau Galle Cheese claims several supervisors talked to Hammel about performance issues, but no improvement was forthcoming.

G. Hammel denies he was ever told his performance was unsatisfactory. He states he was occasionally asked how things were going, but was not

informed his performance was lacking. Hammel agrees that he received help from co-workers, but that generally consisted of them telling him how to do a task differently or more easily, noting that it is not unusual for more experienced workers to share their expertise with new hires. The only comment Hammel remembers came from a co-worker who suggested he slow down because he was outworking others who had been there for several years.

H. Hammel states he did not request an accommodation because he was not aware of any performance deficiencies and did not see the need to consider accommodation.

I. Hammel concedes he may have bumped other employees once or twice. However, he contends workers occasionally bumping into each other was common because they worked at a fast pace in a confined area.

J. Based on its observations, Eau Galle Cheese decided Hammel was unable to perform his job duties with or without accommodation. Eau Galle Cheese does not deny that its concern for Hammel's safety and the safety of his co-workers was a factor in its decision to discharge him. The evidence indicates EGC managers received several complaints from employees who felt unsafe working around Hammel.

K. Nineteen of Hammel's co-workers were contacted, by mail, as witnesses in the investigation. Sixteen of those individuals responded. Without exception, the people who had an opportunity to work with Hammel indicated they did not believe he was capable of performing his job. Witnesses stated they observed Hammel bumping into co-workers, carts, and equipment. Most worried

about getting hurt when they worked around him. Several thought Hammel was reckless and showed little concern for his safety and the safety of others. Witnesses also corroborated EGC's claim that Hammel took unauthorized cigarette breaks.

L. Between February 1, 1999, and February 1, 2000, Eau Galle Cheese did not discharge any employees with the exception of Hammel.

V. INVESTIGATOR'S EXPLANATION:

A. Wisconsin Fair Employment Law provides that it is not a violation of the statute to discharge a disabled employee if that employee's impairment is reasonably related to his/her ability to adequately perform a job with or without accommodation. Here, since accommodation does not appear to be an issue, the question becomes whether the Complainant's was physically able to satisfactorily undertake his job duties. The Complainant contends that he did his job sufficiently and was not made aware of any shortcomings. The Respondent disagrees. Tipping the evidence in favor of the Respondent is the information provided by witnesses. Statements from the Complainant's peers indicate the Complainant was not doing his job adequately. Therefore, it would appear the Respondent did not violate Wisconsin Fair Employment Law when it discharged the Complainant.

B. Wisconsin Fair Employment Law permits an employer to take into consideration the present and future safety of the disabled employee and his/her co-workers when determining whether that employee can adequately undertake the responsibilities of a particular job. The Respondent

states it considered the safety of the Complainant and other employees when making its decision to dismiss him. The Respondent concluded that continued employment of the Complainant created a potential hazard to himself and others. The Complainant argues that the Respondent has not met its burden in establishing there was reasonable probability he or someone else would be injured if he remained. In view of the information provided by those who are familiar with the Complainant's job duties and had an opportunity to work with and observe the Complainant, it is not unreasonable to conclude that an accident or injury might have occurred had the Complainant continued working for the Respondent.

Mark Robarge
Equal Rights Officer

cc: Complainant
Respondent, attention: Ron Hemmy
Scott C. LaBarre, Attorney for the Complainant
Carol Dittmar and Teresa O'Halloran,
Attorneys for the Respondent EEOC

Scott McCallum
Governor

Jennifer Reinert
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[LOGO]

State of Wisconsin
Department of Workforce Development

PAUL S HAMMEL
ROUTE 1 BOX 44A
ZUMBRO FALLS MN 55991
Complainant

vs.

EAU GALLE CHEESE FACTORY
N6765 STATE HWY 25
DURAND WI 54736
Respondent

NOTICE REGARDING APPEAL RIGHTS (PROBABLE CAUSE FINDING NOT APPEALABLE)

Re: ERD Case No. CR200000674
EEOC Case No. 26GA00774

To All Parties:

Enclosed are the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge in the above-entitled matter.

The Administrative Law Judge has concluded there is probable cause to believe that the Respondent has engaged in discriminatory practices. This finding is not subject to

appeal by the Respondent. A hearing on the merits of the complaint will be scheduled sometime in the near future.

If both parties indicate to the Department in writing that they would like assistance in settling this case, the Administrative Law Judge assigned to hear the case on the merits will contact you to offer assistance.

Dated and Mailed On: APRIL 5, 2001

cc: Complainant
Respondent
Scott C. LaBarre, Attorney for Complainant
Carol S. Dittmar, Attorney for Respondent

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Paul S. Hammel
Route 1 Box 44A
Zumbro Falls, MN 55991

Complainant,

DECISION AND ORDER

ERD CASE NO. 200000674
EEOC CASE NO. 26GA00774

v.

Eau Galle Cheese Factory
N6765 State Highway 25
Durand, WI 54736

Respondent,

In a complaint filed with the Equal Rights Division of the Department of Workforce Development on February 21, 2000 the Complainant (Hammel) alleged that the Respondent (EGCF) discriminated against him, in violation of the Wisconsin Fair Employment Act, when it terminated his employment because of his disability. In an Initial Determination issued on October 5, 2000 an investigator for the Division concluded there was no probable cause to believe the Act was violated as alleged. Hammel filed a timely appeal and the matter was certified to hearing. Pursuant to notice a hearing was held on March 27, 2001 in Eau Claire, Wisconsin before Gary L. Olstad, an Administrative Law Judge for the Division. Hammel appeared in person and by Attorney Scott C. LaBarre. EGCF appeared by Attorney Carol S. Dittmar. The hearing was concluded on March 27, 2001. A transcript of the proceedings has not been prepared.

Following Hammel's testimony and the introduction, into the record, of various responses to interrogatories by

EGCF it was clear to the undersigned that Hammel had presented a *prima facie* case of discrimination on the basis of his disability and that a finding of probable cause was inescapable. The Administrative Law Judge and the parties' attorneys had an off the record discussion regarding the posture of this matter and the hearing was concluded without EGCF putting on any evidence.

Based upon the testimony given and the evidence received at the hearing in this matter the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. EGCF, located in Durand, Wisconsin, is engaged in the business of making and packaging cheese. EGCF employs people in various capacities, such as general laborers, to carry out its functions.

2. Hammel was employed by EGCF as a general laborer from January 8, 2000 until his employment was terminated on January 27, 2000.

3. Hammel suffers from congenital glaucoma and is considered legally blind. Hammel's right eye was surgically removed some years ago and he has a 20 degree, or less, field of vision in his left eye.

4. At the time of his hire Hammel informed EGCF of his vision impairment. One of the factors in the termination of Hammel's employment was his restricted vision.

Based upon the Findings of Fact made above the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. EGCF is an employer within the meaning of the Wisconsin Fair Employment Act.

2. There is probable cause to believe Hammel is disabled within the meaning of the Wisconsin Fair Employment Act.

3. There is probable cause to believe EGCF discriminated against Hammel because of his disability, in violation of the Wisconsin Fair Employment Act, when it terminated his employment on January 27, 2000.

Based upon the Findings of Fact and Conclusions of Law made above the Administrative Law Judge issues the following:

ORDER

1. The Initial Determination, issued on October 5, 2000 is hereby set aside and this matter shall be scheduled for a hearing on the merits of the complaint.

Dated at Milwaukee, Wisconsin APRIL 5, 2001.

/s/ [Illegible]
Gary L. Olstad
Administrative Law Judge

ERD CASE NO. CR200000674
EEOC CASE NO. 26GA00774

states he was occasionally asked how things were going, but was not informed his performance was lacking. Hammel agrees that he received help from co-workers, but that generally consisted of them telling him how to do a task differently or more easily, noting that it is not unusual for

more experienced workers to share their expertise with new hires. The only comment Hammel remembers came from a co-worker who suggested he slow down because he was outworking others who had been there for several years.

Paul S. Hammel

Complainant
Respondent
Scott C. LaBarre, Attorney for the Complainant
Carol S. Dittmar, Attorney for the Respondent

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Paul S. Hammel
Route 1, Box 44A
Zumbro Falls, MN 55991

Complainant

v.

Eau Galle Cheese Factory
N 6765 State Hwy 25
Durand, WI 54736

Respondent

ORDER OF DISMISSAL

ERD Case No. 200000674
EEOC Case No. 26GA00774

On August 7, 2001 the Complainant through his attorney submitted a form indicating that he intended to proceed in a forum other than the Equal Rights Division, and requesting that his complaint before the Equal Rights Division be dismissed without prejudice to his rights to proceed in other forums. This request was made diligently and the reasons for it were explained adequately. Since it is not in the interest of fairness or judicial economy to maintain proceedings in the ERD while the Complainant litigates in another forum substantially the same issues as would be heard here, the undersigned issues the following:

ORDER

That the complaint before the Equal Rights Division is hereby dismissed with prejudice.

Dated at Milwaukee, Wisconsin AUGUST 15, 2001

/s/ John L. Brown
John L. Brown
Administrative Law Judge

MEMORANDUM

This Dismissal is not intended to adversely affect whatever rights the Complainant has to pursue remedies in any other forum.

cc: Paul S. Hammel, Complainant
Eau Galle Cheese Factory, Respondent
Scott C. LaBarre, Attorney for Complainant
Carol S. Dittmar, Attorney for Respondent
EEOC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL HAMMEL,

Plaintiff,

v. Case No. 02 C 0405 C

EAU GALLE CHEESE FACTORY,

Defendant.

JOINT PRETRIAL STATEMENT

A. STIPULATED UNCONTESTED FACTS

1. Plaintiff Paul Hammel ("Plaintiff") was born on September 8, 1950.

2. Plaintiff has a high school degree. Plaintiff does not have any post-secondary education. Plaintiff worked as a pipefitter for 14 years until he was determined legally blind in 1991.

3. Plaintiff has no vision in his right eye and the field of vision in his left eye is restricted to a corridor of less than twenty degrees. Plaintiff's condition has steadily worsened since January of 2000. Plaintiff's physical impairment is a disability as defined by the Americans With Disabilities Act of 1990 42 U.S.C. 12101 et seq.

4. Plaintiff became qualified for and began receiving full Social Security Disability benefits (SSDI) in 1991. At the same time he also qualified for and began receiving pension disability benefits from the Plumber and Pipefitters National Pension Fund. He has received those benefits on a continual basis since 1991.

5. In 1995, Plaintiff became a student at BLIND, Inc. in Minneapolis, Minnesota and received vocational rehabilitation training for the blind at BLIND, Inc.

6. Defendant Eau Galle Cheese Factory is a Wisconsin corporation that makes hard Italian cheese. Defendant currently employs 25 people.

7. Plaintiff contacted defendant in early January of 2000 regarding possible employment. Soon after, plaintiff met with Ron Hemmy, defendant's general business manager, to discuss an available position for a "general laborer" at defendant's plant in Durand, Wisconsin.

8. During the discussion, plaintiff told Hemmy that he was legally blind. Plaintiff explained that he has no vision in his right eye and that the vision in his left eye is very limited as a result of congenital glaucoma.

9. After Hemmy interviewed Plaintiff, he spoke with the plant supervisors and asked them whether they believed that a person with "some vision limitation would have any particular problems in the work environment." After these discussions defendant decided to hire Plaintiff.

10. Hemmy called plaintiff on January 7, 2000, to tell him that he was hired. Plaintiff began work the following day.

11. The brine room duties at the factory included turning cheese wheels on moveable racks, taking the cheese wheels from the rack and placing then [sic] in the brine tank, turning the cheese in the brine tank, salting the cheese in the brine tank, removing the cheese wheels from the tank, placing the cheese wheels on drying racks, and placing and stacking the cheese wheels on pallets. The make room duties included taking cheese material off the drain table and putting

it into forms, picking up the forms and placing them on moveable press racks, pulling the press lever to squeeze out moisture once the racks were full, removing the forms from the racks, removing the cheeses from the forms, flipping them, placing the cheeses first in cheesecloth, then into another wheel form, trimming the cheeses with a knife, putting the trimmings in the grinder and operating the grinder, placing the forms on a cart: and moving the cart through the swinging doors to the brine room. At times, the movement of product required the use of hydraulic or motorized pallet jacks. Multiple employees worked in both the make room and the brine room. Defendant assigned Plaintiff various tasks in both rooms.

12. Plaintiff never injured any of his co-workers. Plaintiff never sustained any injuries for which he sought medical treatment.

13. No one informed plaintiff during the course of his employment at defendant's facility that he would be terminated if his performance did not improve. After his initial interview with Hemmy, no one at Eau Galle asked plaintiff or anyone else outside of the company whether there were any accommodations that would assist plaintiff in performing his job or in making it safer. None of the supervisors or managers at Eau Galle had experience working with blind people.

14. On January 25 or 26, 2000, Buhlman, Hemmy, Simpson, Smith and Anibas discussed concerns about Plaintiff. During the meeting, they decided to terminate plaintiff. The following day, January 27, 2000, Hemmy called plaintiff into his office and told him that his supervisors had reported that his vision impairment interfered "to some extent" with his work and that they were concerned for his safety and the safety of other workers.

15. During a later meeting, Hemmy told plaintiff's spouse that plaintiff had been terminated because of safety concerns. In a memo dated, February 3, 2000, Hemmy wrote that plaintiff had been terminated for "non disciplinary reasons."

16. Defendant provides its employees with the following benefits: comprehensive health insurance, dental insurance, paid vacation based on years of service, six days of paid sick leave per year, and a profit-sharing retirement plan. Qualification and vesting are subject to the terms of the various benefit plans.

17. Depending on the annual success of the company, Defendant's employees may receive profit sharing contributions that total up to 15% of an individual's annual compensation. However an employee is not entitled to this benefit during the first year of service and is not completely vested in the benefit until the 6th year of employment.

18. Plaintiff was hired at a wage of $8.50 per hour. Plaintiff earned a gross income of $433.08 his first full week of employment with Defendant and $436.90 his second full week of employment.

B. PROBABLE LENGTH OF TRIAL

1. The parties anticipate that it will take three days to try this matter.

C. PROSPECTIVE WITNESSES

Plaintiff's Prospective Witnesses

1. Paul Hammel
2. Richard Davis
3. Ron Hemmy

4. John Buhhnan
5. John Anibas
6. Douglas G. Smith
7. Daniel P. Simpson
8. David Kallstrom
9. Michael Ulwelling
10. John Fritz
11. Professor Elizabeth Gunderson
12. All witnesses necessary for rebuttal or impeachment.

Defendant's Prospective Witnesses

1. Ron Hemmy
2. John Buhlman
3. Robert J. Pelke
4. John Anibas
5. Doug Smith
6. Steven Stellar
7. Daniel P. S/ mpson
8. Joe Sabelko
9. Rick Armstrong
10. Frederick Kolb
11. Any witness necessary for rebuttal *or impeachment.*

D. QUALIFICATIONS OF EXPERT WITNESSES

Defendant has stipulated to the qualifications of Plaintiff's vocational expert (Richard C. Davis) and Plaintiff's economics expert (Professor Elizabeth Gunderman).

Plaintiff has refused to stipulate to the qualification of Defendant's vocational expert (Richard Armstrong) but has stipulated to the qualifications of Defendant's economics expert (Dr. Frederic Kolb)

E. SCHEDULE OF EXHIBITS

See attached Schedule.

F. CONTESTED LEGAL ISSUES

1. Whether Plaintiff is a qualified individual with a disability who could perform the essential functions of a general laborer at Defendant's factory with or without reasonable accommodations.

2. Whether Plaintiff performed the essential functions of a general laborer without reasonable accommodations.

3. If Plaintiff could not perform the essential functions of the job without reasonable accommodations, whether Defendant failed to provide reasonable accommodations to Plaintiff while he was under its employment.

4. Whether Defendant's failure to provide reasonable accommodations constituted an intentional and direct violation of the Americans With Disabilities Act.

5. Whether Defendant acted with reckless disregard in violating Plaintiff's rights under the ADA.

7. Assuming liability, the amount, if any, of Plaintiff's damages and whether he failed to mitigate his damages.

G. DEPOSITIONS TO BE OFFERED IN EVIDENCE

1. Plaintiff only intends to offer very limited deposition testimony of Steven Stellar into evidence. Plaintiff reserves the right to use depositions for impeachment purposes.

2. Defendant does not plan to offer any depositions into testimony, but reserves the right to use depositions for impeachment.

Dated this ___ day of June, 2003.

GARVEY, ANDERSON, JOHNSON, GERACI & MIRR, S.C.

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Attorneys for Plaintiff
Paul S. Hammel

OCT 26 2005
OFFICE OF THE CLERK

No. 05-384

In The Supreme Court of the United States

PAUL S. HAMMEL,

Petitioner,

v.

EAU GALLE CHEESE FACTORY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent has no objection to the form of the Questions Presented by Petitioner. Specifically, those Questions are:

1. Are non-disability related factors such as an employee's perceived attitude relevant in determining whether that individual is a "qualified individual" under the ADA?

2. Should an employer's duty to participate in the "interactive process" only be triggered after an employee first proposes a specific reasonable accommodation to the employer?

3. Can an employer escape *per se* liability under the ADA if it refuses to participate in the "interactive process"?

RESPONDENT'S RULE 29.6 CORPORATE DISCLOSURE

Respondent, Eau Galle Cheese Factory, is a privately-held Wisconsin Corporation and none of its shares are held by a publicly traded company.

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FEDERAL CASES

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Beck v. Univ. of Wis., 75 F.3d 1130 (7th Cir. 1996) 12

Burnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) 12, 13

Fjellstad v. Pizza Hut of America, Inc., 188 F.3d 944 (8th Cir. 1999) 13

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Hardy v. Sears, Roebuck and Co., 23 A.D.D. 1208 (N.D. Ga. 1996) 8

Hunt-Golliday v. Metropolitan Water Reclamation Dist. Of Greater Chicago, 104 F.3d 1004 (7th Cir. 1997) 8

Jacques v. Clean-up Group, Inc., 96 F.3d 506 (1st Cir. 1996) 13

Kalekiristos v. CTF Hotel Management Corp., 958 F. Supp. 641 (D.D.C. 1997), *aff'd without op*, 132 F.3d 1481 (D.C. Cir. 1997) 10

Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001) 12

Meyer v. Iowa Mold Tooling Co., Inc., 141 F. Supp. 2d 973 (N.D. Iowa 2001) 10

Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996) 13

Palmer v. Circuit Court of Cook County, Social Service Dept., 905 F. Supp. 499 (N.D. Ill. 1995), *aff'd*, 117 F.3d 351 (7th Cir. 1997) 8

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Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000) 12

Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999) 13

Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir. 1996) 13

Weigert v. Georgetown University, 120 F. Supp. 2d 1 (D.D.C. 2000) 9

White v. York International Corp., 45 F.3d 357 (10th Cir. 1995) 13

FEDERAL STATUTES, RULES AND REGULATIONS

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OTHER AUTHORITIES

Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 Va. L.Rev. 717 (1993) 11

John R. Autry, Note, *Reasonable Accommodation Under The ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" But the Law Says "No"*, 79 Chi-Kent L.Rev. 665 (2004) http://www.kenlaw.edu/ilw/AutryVol79.pdf 11

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit be DENIED.

OPINIONS AND ORDERS BELOW

Respondent has no additions to the Opinions and Orders referenced by Petitioner.

JURISDICTION

Respondent agrees with Petitioner's jurisdictional statement.

STATUTES AND REGULATIONS INVOLVED

Respondent has no additions to the Statutes and Regulations referenced by Petitioner.

STATEMENT OF THE CASE

Respondent takes issue with Petitioner's characterization of the case.

This case does ***not*** involve an employer who admitted firing an employee because of his disability. This case involves an employee with decided attitude and work ethic

difficulties who also happened to be disabled. The employee was fired as a result of these difficulties.

Petitioner's claims of potential damage to the spirit, intent and plain language of the ADA as a result of the lower court's rulings are unfounded. It was never the intent of the ADA to guaranty the employment of disabled individuals regardless of their attitude and work ethic. Disabled individuals must still be able to perform the essential functions of a job and it is axiomatic that an acceptable, if not good, work attitude and ethic is an essential function of any job, whether the employee be disabled or not. Via a machination of proof requirements, Petitioner would have this court hold that an individual's work attitude and ethic should have no bearing on whether they are determined a qualified individual with a disability under the ADA. Respondent respectfully submits that the ADA was never intended or meant to be interpreted in such a fashion.

In addition, the following relevant facts have been omitted in Petitioner's statement.

The general laborers at Respondent's place of business, such as Petitioner, convert cheese curds into the hard Italian cheese that Respondent produces. And while doing so they are required to perform a variety of tasks at Respondent's factory in two separate work areas: the "make room" and the "brine room." The employees are expected to perform the tasks assigned in a rapid and efficient manner, while working in close quarters side-by-side. (App. 3-4)

Petitioner was hired as a general laborer in January of 2000 and after having the job duties explained to him Petitioner assured Respondent's business manager that he

could perform the tasks without any special accommodation. (App. 3)

Petitioner's supervisors, John Anibas, Dan Simpson, and Doug Smith testified that Petitioner had problems performing many of his duties from day one. For example, they explained that as part of his duties, Petitioner was expected to mold cheese curds into "cheese wheels" and to "turn" or "flip" the wheels in a manner that would ensure that the final product would have a uniform finish. On a number of occasions Petitioner failed to properly perform this task resulting in a defective or unsaleable product. During the production process, part of Petitioner's job, like his co-workers, was to remove the cheese wheels from the brine tanks and stack them uniformly on drying racks, but on many occasions he failed to place the cheese wheels properly on the racks thus allowing the soft, still pliable, wheels of cheese to hang over the edge causing a portion of the product to be wasted and drop to the floor. In addition, the cheese wheels had to be stamped with the production date in order that they could be tracked in case of contamination. Anibas noted that Petitioner "did not always stamp each cheese" as was instructed, either stamping the cheese illegibly or failing to properly apply the stamp to the finished product. Another example of Petitioner's lack of attention or aptitude was evidenced in his repeated difficulty stacking cheese in a manner so as to prevent them from being damaged by tipping over and falling off the pallet and/or causing a safety hazard. Furthermore, his supervisors testified that Petitioner failed to "keep the stacks of cheese wheels level," resulting in unbalanced pallets that posed risks of toppling over. Anibas observed that, in general, Petitioner also "worked too slowly at his

tasks to keep up with the speed of [the] cheese production." (App. 4-5)

Aside from a general lack of aptitude and/or ability Petitioner also was known to exhibit a poor attitude and perform many of his tasks carelessly and without regard for his safety or that of his co-workers. Indeed, Simpson testified that he "thought the plaintiff seemed eager to work during the first week but seemed to lose interest during the second week, when he spent more time talking with his co-workers and taking breaks than doing his job." Simpson stated that he had observed Petitioner literally slamming cheese rounds down on a work table, a dangerous act which posed a risk to other workers who were at the same table [considering] the wheels weigh about 30 pounds or more and could inflict injury if they landed on someone's hand or foot. On another occasion, an employee watched Petitioner drive an electrically powered pallet jack bearing a pallet of finished cheese wheels into the wall causing the wheels of cheese to fall off. His supervisors on occasion expressed concern and fear that Petitioner might be seriously injured by tripping over hoses that were strategically positioned on the factory floor to wash away excess brine. In addition, Simpson frequently observed Petitioner banging into the factory machinery (e.g. hitting his head on the press rack) and Petitioner even made a point of showing him bruises on his legs that were presumably the result of Petitioner's bumping into things. Furthermore, in disregard for his safety, Petitioner repeatedly placed his hands not on top of, but inside the grinding machine when using that apparatus, even having been ordered by Simpson to cease and desist from such a practice. When Simpson finally ordered him not to use the

machine anymore he acted disgusted with Simpson. (App. 5-6)

Petitioner's run-in with Simpson was not the only time he demonstrated a propensity for arrogance and insubordination. Petitioner also continued to make personal phone calls on company time in spite of the fact that he had been frequently told by Anibas not to do so and also walked away from his post whenever he wanted to go outside for a cigarette. On one occasion Petitioner went so far as to taunt Smith after he (Petitioner) had been reprimanded for taking an unauthorized break by mocking him and in an offensive tone saying "Here I am Dougie, Dougie what do you want me to do now?" Petitioner's co-workers described him as a slacker with a bad attitude. (App. 6)

Petitioner's supervisors warned him about his inappropriate behaviors and in an attempt to accommodate him eventually moved him to the "make room" on a permanent basis despite the fact that Respondent's practice was to rotate employees between the "make and brine rooms". Nonetheless, Petitioner's performance did not improve and his supervisors requested a meeting with Ron Hemmy, Respondent's business manager, and the individual who had hired Petitioner. The supervisors told Hemmy about Petitioner's insubordination, poor attitude and work ethic, and related concerns about his carelessness. Hemmy decided that the only course of action was to terminate Petitioner, however when Hemmy advised Petitioner of his termination Hemmy attempted to "sugar-coat" the reasons and told Petitioner that he was being discharged because his limited vision interfered with his work to some extent and that management had safety concerns. (App. 6-7)

Petitioner failed to demonstrate any reasonable accommodation which could have been implemented by Respondent. The accommodations proposed by Petitioner's expert (1) were adaptive techniques which Petitioner had already learned and was failing to implement; (2) required the assistance of another employee which the ADA does not require as a reasonable accommodation; (3) were simply absurd (using verbal cues in a factory setting where employees are required to use earplugs due to the noise level); or (4) did nothing to allow Petitioner to perform the essential requirement of the job. (App. 23-26)

REASONS FOR NOT GRANTING THE WRIT

No compelling reason has been presented by the decision below warranting this Court's review. The decision does not present an important question of federal law which needs to be settled by this Court nor is there a sufficient split in authority among the circuits requiring this Court's guidance.

I. No Federal Question Has Been Presented As To The Definition Of A Disabled Individual Under The ADA.

Sup. Ct. R. 10 states that certiorari may be granted when, *inter alia*, a United States Court of Appeals has decided an important federal question which should be settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10. This rule further notes, "A petition for a writ of certiorari is rarely granted when the

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner asserts a federal question has been presented via the Appellate Court's use of attitudinal factors in determining whether an individual is "qualified" as that term is used and defined under the applicable ADA regulations. However, the lower court's analysis is consistent with the definition of a disabled individual under the applicable ADA regulations and as such presents no conflict with the relevant decisions of this Court. When petitioner's argument is "defrocked" of its purported federal question allegations, all that has been argued is error in the lower court's receipt of additional evidence in light of a joint pre-trial statement of undisputed facts. This type of asserted error hardly presents a federal question reviewable by this Court. Nonetheless, respondent will address the petitioner's alleged instances of error.

Petitioner correctly cites the definition of a qualified individual under the ADA but then proceeds to ignore it in his argument for review.

The ADA defines a "qualified individual" as:

> An individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position.

29 C.F.R. Sec. 1630.2(m); *see also* 42 U.S.C. Sec. 12111(8).

As held by the lower courts in this case it is axiomatic that a good attitude is a requirement of any job, together

with the acceptance of supervision, the ability to refrain from defying and mocking one's supervisors and the ability to get along with fellow workers. (All of which are arguably subsumed within the "good attitude" characteristic.)

The court observed in *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 14 A.D.D. 100, (N.D. Ill. 1996), *judgment aff'd in part on other grounds, rev'd in part on other grounds*, 104 F.3d 1004, (7th Cir. 1997), that acceptance of supervision is an essential job function and that the employee's inability to do so prevented her qualified individual status under the ADA.

In addition, several Courts have espoused the view that the ability to get along with others in the workplace constitutes an essential job function, and that an employee who cannot do so is not a qualified individual with a disability under ADA Title I. The court in *Palmer v. Circuit Court of Cook County, Social Service Dept.*, 905 F. Supp. 499 (N.D. Ill. 1995), *aff'd*, 117 F.3d 351 (7th Cir. 1997), observed that a person who displays abusive and threatening conduct toward co-workers is not a qualified individual with disability within the meaning of 42 U.S.C.A. § 12111(8), since the essential functions of any job include the avoidance of such behavior. Acknowledging that the ability to maintain a non-combative atmosphere in the workplace, that is, to interact peacefully with supervisors, other employees and customers, is an essential job function, the court in *Hardy v. Sears, Roebuck and Co.*, 23 A.D.D. 1208 (N.D. Ga. 1996), said that abusive and threatening behavior directed by an employee toward co-workers and customers may dictate that the employee cannot perform the essential functions of a given job, and thus is not a qualified individual with a disability within the meaning of 42 U.S.C.A. § 12111(8), if the disruption caused by such

behavior is substantial. And in *Weigert v. Georgetown University*, 120 F. Supp. 2d 1 (D.D.C. 2000), a university research assistant failed to establish that she was a "qualified individual with a disability" within the meaning of Americans with Disabilities Act (ADA) since there was no accommodation that the university or its employees could have instituted to control research assistant's consumption of medication that would have permitted her to perform the essential function of compatibly interacting with her co-workers and supervisors. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C. § 12111(8).

Petitioner does not go so far as to state that an employer could not require a good attitude as an essential job function but states that because the parties entered into a joint pre-trial statement setting forth various uncontested facts including the uncontested essential functions of Petitioner's employment position and, further, as "good attitude" was not specifically listed as an essential function, the court erred in considering Petitioner's attitude in determining whether he was a qualified individual. This is an untenable argument.

First, there is absolutely nothing in the Joint Pre-Trial Statement which indicates that it was ever meant to be exclusive of any other evidence. (App. 134-141) Secondly, pursuant to Petitioner's argument, Respondent could have proven at trial that Petitioner showed up drunk every day and assaulted his co-workers but this evidence should have been inadmissible because showing up sober and not assaulting one's co-workers was not listed as an essential function. As earlier stated this position defies common sense and exemplifies the argument's failure.

An essential function of a job may be established, for purposes of ADA claim, by evidence that includes: (1) the employer's judgment as to which functions are essential, (2) written job descriptions prepared before advertising or interviewing applicants for the job, (3) the amount of time spent on the job performing the function, (4) the consequences of not requiring the incumbent to perform the function, and (5) the current work experience of incumbents in similar jobs. Americans with Disabilities Act of 1990, §§ 2 et seq., 42 U.S.C. §§ 12101 et seq. *Meyer v. Iowa Mold Tooling Co., Inc.*, 141 F. Supp. 2d 973 (N.D. Iowa 2001). Likewise, citing 29 C.F.R. § 1630.2(n)(3), the court observed in *Harden v. Delta Air Lines, Inc.*, 900 F. Supp. 493 (S.D. Ga. 1995), that evidence whether a particular job function is essential includes the consequences of not requiring the incumbent to perform the function. The court noted in *Kalekiristos v. CTF Hotel Management Corp.*, 958 F. Supp. 641 (D.D.C. 1997), *aff'd without op*, 132 F.3d 1481 (D.C. Cir. 1997), that relevant evidence whether a particular job function is essential, and therefore must be performable in order for an individual to be a qualified individual with a disability under ADA Title I, includes the consequences of not requiring that the function be performed. The consequences of any non-disabled individual displaying the attitude which Petitioner employed would have been termination.

In sum, Petitioner's allegations of federal question issues are really nothing other than allegations of evidentiary error and those arguments fail as well. There is simply nothing which would warrant this Court's review under federal question jurisdiction.

II. There Is No Substantive Conflict Among The Circuits Regarding An Employer's Obligation To Engage In An Interactive Process.

"[T]he 'single most important' factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below." Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 Va. L.Rev. 717, 726 (1993) (*quoting* H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991)). However, while the Circuits may appear to be semantically split on the issue of when the interactive process is triggered when a disabled individual requests or needs accommodation, upon a substantive review of these decisions no actual conflict has been presented.[1]

A. The Circuits Are Not Split In Finding No Independent Liability For An Employer's Failure To Engage An Interactive Process.

First, if this Court agrees that Petitioner was not a qualified individual for purposes of the ADA there is no need to address an employer's obligation to engage in the interactive process as held by the Appellate Court (App. 27, fn. 10.).

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[1] A thorough and invaluable analysis of circuit rulings relative to the issue of a required interactive process is found in John R. Autry, Note, *Reasonable Accommodation Under The ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" But the Law Says "No"*, 79 Chi-Kent L.Rev. 665 (2004). The author states Supreme Court review would be helpful due to the purported split among the circuits but goes on to assert his hypothesis that the Court may be refusing to take these cases as in reality there is no split.

Even assuming an interactive process is required under the ADA and further assuming an employer fails to engage in such a process, no Circuit has found independent liability for the employer's failure to do so when presented with an unqualified individual. In other words, if an employee is not a qualified individual under the ADA it is of no consequence whether the interactive process was employed or not. There is no split among the Circuits on this issue. *See Kvorjak v. Maine*, 259 F.3d 48, 53 (1st Cir. 2001) quoting *Soto-Ocasio v. Fed. Exp. Corp.*, 150 F.3d 14, 19 (1st Cir. 1998) (where the employer failed to engage in the interactive process such an omission is of no moment if the record forecloses a finding that the plaintiff could perform the duties of the job, with or without a reasonable accommodation); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1005, 1136 (9th Cir. 2000) (employers who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute [only] if a reasonable accommodation would have been possible); *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-16 (7th Cir. 2000) citing *Beck v. Univ. of Wis.*, 75 F.3d 1130, 1135 (7th Cir. 1996) (when assigning ADA liability to employers it is insufficient for plaintiffs to show that the employer simply failed to engage in the interactive process). An employer is not liable under the Act even where it refuses to interact unless its refusal also leads to a failure to accommodate and a reasonable accommodation was available to render the plaintiff statutorily qualified Autry, *supra* at 689.

B. There Is No Substantive Circuit Split Even In Cases Dealing With The Interactive Process And Qualified Individuals.

In addition, and despite Petitioner's assertions, Respondent respectfully submits that no actual split among the circuits exist when dealing with the interactive process and qualified individuals. Although many Courts and commentaries have stated a split exists, upon review and actual application, the split is only semantic and not operational in nature.

For example, most Circuits profess to "require" employers to engage in the interactive process when presented with qualified individuals. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999), *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996). Two hold that employers are not required to do so, *White v. York International Corp.*, 45 F.3d 357 (10th Cir. 1995), *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), and two others evaluate interactive process liability on the facts of each case, *Jacques v. Clean-up Group., Inc.*, 96 F.3d 506 (1st Cir. 1996), *Fjellstad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999), Autry, *supra* at 677-84. However,

> Courts that require employers to interact contend that they are assigning ADA liability for a failure to engage in the [interactive] process. On closer inspection, however this contention is manifestly false . . . the court looks for evidence of appropriate accommodations that the defendant failed to discover when it did not interact. The key to liability, then, is the defendant's failure to implement one of the available appropriate accommodations, *not* the failure to interact with the plaintiff . . . .

> There is, then, no situation (and no Circuit) in which an employer is *required* by law to engage in the interactive process. Liability only attaches under the ADA if the employer fails to reasonably accommodate the limitations of an employee's disability . . . If the employee has been reasonably accommodated, ADA liability cannot attach, regardless of whether the accommodation was produced without employee input. Thus, those Courts that recognize an interactive process participation requirement are fooling themselves and their litigants, the ADA, as currently drafted, permits no such requirement.

Autry, *Id.* at 690-91 (cites omitted).

In this case, Petitioner presented no evidence of any reasonable accommodation Respondent could have implemented which would have allowed him to do the essential functions of his job. As such Respondent has no ADA liability regardless of whether an interactive process was employed or not.

CONCLUSION

Petitioner's claims of potential damage to the spirit, intent and plain language of the ADA as a result of the lower courts' rulings are unfounded. It was never the intent of the ADA to guaranty the employment of disabled individuals regardless of their attitude and work ethic. Disabled individuals must still be able to perform the essential functions of a job and it is axiomatic that an acceptable, if not good, work attitude and ethic is an essential function of any job, whether the employee be

disabled or not. These matters hardly present issues of federal question jurisdiction.

Secondly, there is no split of authority in the Circuits regarding an employer's interactive process duties and non-qualified individuals – the only issue presented by this case. However, even if the Court expands its review to those cases involving qualified individuals there is no substantive conflict in the Circuits below.

As such, Respondent respectfully requests the Petition For A Writ Of Certiorari be denied.

Dated this 24th day of October, 2005.

Respectfully submitted,

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